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In The

Supreme Court of the United States

October Term, 1985

THOMAS D. ROBINSON, RICHARD V. KITTS, RICHARD C. NEWMAN, JOHN E. NEAL and ROBERT L. KAPP,

Petitioners,

vs.

DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED

1. May petitioners' counsel be assessed an amount under Rule 38 of the Federal Rules of Appellate Procedure without notice, without a hearing and without a finding that the attorney acted in bad faith?

2. May petitioners' counsel be asesssed an amount under Rule 38 of the Federal Rules of Appellate Procedure without a finding that all issues raised by counsel were frivolous?

3. May petitioners' counsel be assessed an amount under Rule 38 of the Federal Rules of Appellate Procedure when the court's finding is arbitrary, capricious and in disregard of the facts?

4. Under 5 U.S.C. § 7513 may employees be dismissed by a person who is not authorized to dismiss them?

5. Under 5 U.S.C. § 7513 and the Fifth Amendment to the Constitution may employees be dismissed without the notice provided for in the statute?

6. May employees be dismissed for striking when the agency failed to submit evidence that there was a strike at the time in question and the evidence reflected that there was no strike at the time?

7. May the Merit Systems Protection Board establish a rule of evidence wherein only the evidence submitted by an employee must be "objective" wherein the agency may resort to hearsay evidence?

8. Where the Office of Personnel Management, the agency authorized to implement 5 U.S.C. § 7513 provides by regulation that in arriving at its decision the agency shall consider only the

reasons specified in the notice of proposed action, may the agency dismiss the employees for a reason not specified in the notice of proposed action?

9. Where the Office of Personnel Management, the agency authorized to implement 5 U.S.C. § 7513, provides by regulation that the notice of decision be delivered to the employee at or before the time the action will be effective, is the decision of dismissal effective if the notice is not delivered at or prior to the effective date?

LIST OF PARTIES

The parties named in the caption and Harry D. Shargel, Esq., counsel for the petitioners.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit is reported at 769 F. 2d 1556 and is set out in the Appendix hereto at 2a.

The opinion of the Merit Systems Protection Board is set out in the Appendix hereto at 6a.

The opinion of the Presiding Official of the Merit Systems Protection Board is set out in the Appendix hereto at 10a.

JURISDICTION

The initial judgment of the Court of Appeals was made and entered on July 31, 1985 (2a). A petition for rehearing was denied and entered September 9, 1985 (1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS, RULES AND REGULATIONS INVOLVED

The pertinent text is set forth in the Appendix at pages 41a-54a.

United States Constitution:

Fifth and Sixth Amendments (41a).

Statutes:

5 U.S.C. §§ 7513; 7701; 7703 (41a-45a).

Regulations:

Office of Personnel Management (OPM) Regulations issued pursuant to 5 U.S.C. § 7513(a):

5 C.F.R. 752.404 (45a).

Other regulations issued by OPM:

5 C.F.R. 630.401; C.F.R. 630.403 (47a-48a).

Merit Systems Protection Board (MSPB) Regulations:

5 C.F.R. 1201.33; 1201.56; 1201.72 (48a-51a).

Court Rules:

Federal Rules of Appellate Procedure:

Rule 38 (51a).

Federal Rules of Civil Procedure:

Rule 11; Rule 37(b) (51a-54a).

STATEMENT OF THE CASE

Jurisdiction of the Merit Systems Protection Board arose under 5 U.S.C. § 7513 and 5 U.S.C. § 7701.

Jurisdiction of the United States Court of Appeals for the Federal Circuit arose under 5 U.S.C. § 7703.

Harry D. Shargel is and was counsel for the employees-petitioners herein and joins herein because the Court of Appeals, in affirming the opinion of the Merit Systems Protection Board, decided:

> "Under the provisions of Rule 38, Fed.R.App.P., counsel Harry D. Shargel is assessed in favor of the government the sume of $500."

Employees-petitioners are Air Traffic Control Specialists who were employed by the Federal Aviation Administration (FAA) at the

Philadelphia Tower in Philadelphia, Pennsylvania, under the jurisdiction of the Eastern Region of the FAA. In August 1981 and prior thereto, said tower was headed by Robert J. Beckelman, Jr., Facility Chief.

As both proposing and deciding official, said Beckelman dismissed the petitioners who then appealed to the Merit Systems Protection Board (MSPB) at its Philadelphia office.

Beckelman initiated proceedings to remove each of the petitioners by the use of a form letter addressed separately to each which stated, "This is notice that I intend to remove you from your position". Two reasons were given: Reason 1 was violation of 5 U.S.C. § 7311 and 18 U.S.C. § 1918 (striking); Reason 2 was "Unauthorized Absence". Under reason 1 there was a "Specification" that beginning approximately 7:00 a.m. EDT, on August 3, 1981, a nationwide strike of air traffic controllers had occurred; and that beginning at specified date and time the petitioners had participated in a strike against the government. Under reason 2 there was a "Specification" that beginning first at a designated shift on a specified date "you failed to report for your scheduled tour of duty" and remained absent without authorization.

Each letter advised that the material relied upon was available at the Philadelphia Tower and stated: "If you wish to review this material, please contact Thomas P. Hamill, Deputy Chief". Each letter also recited a reasonable cause to believe that the addressee had committed a crime and advised "you may reply to this notice personally, in writing or both and furnish evidence to me, within 7 calendar days after you receive this letter."

Thomas D. Robinson

The notice dated August 6, 1981, addressed to Robinson specified striking beginning at 1500 EDT on August 6, 1981 and unauthorized leave beginning at the 1500 EDT to 2300 EDT shift on August 6, 1981. The appeal file contained a postal receipt reflecting mailing of the notice on August 6, 1981. There was no return receipt of reflecting delivery. By letter dated August 17, 1981, Beckelman advised Robinson that he was removed effective August 21, 1981. The appeal file contained postal receipts which reflected mailing August 17, 1981 and received August 19, 1981.

Richard V. Kitts

The notice dated August 6, 1981, to Kitts specified striking beginning at 0700 EDT on August 6, 1981 and unauthorized leave beginning at the 0700 EDT to 1500 EDT shift on August 6, 1981. The appeal file contained registered mail postal receipts reflecting mailing of the notice on August 6, 1981 and received by Sally Kitts on August 10, 1981. By letter dated August 17, 1981 Beckelman advised Kitts he was removed effective August 21, 1981. The appeal file contained postal receipts which reflected mailing August 17, 1981 and receipt by Susan Kitts on August 25, 1981.

Richard C. Newman

The notice dated August 6, 1981 to Newman specified striking beginning at 1512 EDT on August 3, 1981 and unauthorized leave beginning at the 1512 EDT to 2312 EDT shift on August 3, 1981. The appeal file revealed mailing of the notice by registered mail on August 6, 1981. There was no return receipt reflecting delivery. By letter dated August 17, 1981 Beckelman advised Newman that he was removed effective August 21, 1981. The appeal file

contained postal receipts which reflected mailing on August 17, 1981 and receipt by Sharon A. Newman on August 18, 1981.

John E. Neal

The notice dated August 6, 1981 addressed to Neal specified striking beginning at 1512 EDT on August 6, 1981 and unauthorized leave beginning at the 1512 EDT to 2312 EDT shift on August 6, 1981. The appeal file contained registered mail postal receipts reflecting mailing August 6, 1981 and received by Geraldine M. Neal on August 7, 1981. By letter dated August 17, 1981, Beckelman advised Neal he was removed effective August 21, 1981. The appeal file contained a postal receipt which reflected mailing August 17, 1981. It did not contain a postal receipt reflecting deliver.

Robert L. Kapp

The notice dated August 6, 1981 addressed to Kapp specified striking beginning at 1512 EDT on August 6, 1981 and unauthorized leave beginning at the 1512 EDT to 2312 EDT shift on August 6, 1981. The appeal file revealed mailing of the notice by registered mail August 6, 1981. The return receipt reflected that it was returned "unclaimed" — it was not delivered. By letter dated August 17, 1981, Beckelman advised Kapp he was removed effective August 21, 1981. The postal receipt reflects mailing August 17, 1981 and receipt by Mrs. Connie Taylor on August 19, 1981.

By order dated April 7, 1982, the Chief Administrative Law Judge, MSPB, authorized discovery national and regional in scope and directed that it be completed May 31, 1982. By notice dated April 12, 1982, the MSPB Philadelphia Regional Director stated: "No extensions of time for submission of discovery requests will be granted past May 31, 1982."

In response to interrogatories the Agency stated that information relative to mailing of the notice of intent and notice of decision and the date each employee received the notice of intent was contained in the appeal file.

The MSPB Administrative Law Judge by Discovery No. ALJ-1, under 16(a), ordered the FAA to make available for inspection and copying all documents pertaining to the procedures, policies and guidelines to be followed in discharging controllers in 1981.

By order dated April 12, 1982, the Presiding Official ordered the deposition of Robert J. Beckelman, Jr., and further directed: "These deposition proceedings must be completed by May 31, 1981."

By order dated April 29, 1982, the Presiding Official appointed the petitioners' attorney and two other law firms as a committee to take the deposition of Beckelman on behalf of the clients of various law firms. The only two law firms dropped out, leaving petitioners' attorney as the only member of the committee to take the deposition of Beckelman. One of the two dropped out after a motion to reconsider the order of April 29, 1982 was made by the agency to drop both of said law firms because they failed to file timely requests to depose Beckelman. There was no motion to reconsider the order directing the deposition of Beckelman. As a matter of fact, the proposed order attached to the moving papers was in consonance with the order to depose Beckelman.

The Agency failed to produce Beckelman. Petitioners' attorney on June 4, 1982, moved for sanctions granting the appeal on behalf of all appellants involved in the deposition of Beckelman for failure to produce Beckelman and the documents which allegedly reflected authority of Beckelman to dismiss petitioners.

The Agency did not oppose the motion. It submitted no response to the motion. On September 20, 1982, the date before the hearing, the Presiding Official orally advised counsel that the motion was denied.

In response to petitioners' motion for discovery, the Agency, under date of April 1, 1982, submitted to the Presiding Official "Respondent's Objection to Appellant's Motion for Discovery". Therein the Agency advised the Presiding Official and petitioners' attorney as follows:

> "Respondent objects to the proposed deposition of the deputy chief of Philadelphia International Tower. The facility chief made the decision to remove Appellant from his position as an air traffic control specialist. The deputy tower chief has no information relevant to the matter before this Board."

At the MSPB hearing the Agency offered the deputy chief of Philadelphia Tower (Thomas P. Hamill) as its sole witness allegedly having full knowledge relevant to the matter before the Board. The agency offered the explanation that it had willfully lied as a matter of policy. Thus it stated:

> "In developing responses to requests for depositions, it was the policy of the Eastern Region of the FAA to avoid depositions of other than the Facility Chiefs in order to minimize operational impact. Therefore, a general response was developed which opposed such depositions on the grounds that the facility chief was, in many cases, the person most knowledgeable of the policies, procedures and practices used in implementing the removal under appeal."

At the hearing petitioners objected to the testimony of Hamill; moved for sanctions granting petitioners' appeal, and urged the MSPB to refer the matter to the Department of Justice for criminal prosecution. The Presiding Official refused to impose sanctions, permitted Hamill to testify and refused to refer the matter to the Department of Justice.

Petitioners introduced into evidence a regulation which delegated authority to act as a deciding official in adverse actions involving removal to:

(a) Deputy Regional Director

(b) Executive Officer

(c) Division Chiefs and Assistant Division Chiefs

(d) Heads of Staff Office

and further stated:

"This authority may not be delegated."

Accordingly, on this record, the Tower Chief, Beckelman, who dismissed the employees-petitioners acted without authority.

In the pertinent FAA Region there was no authority to dismiss anybody for unauthorized absence. There was no authority for making specifications of striking or unauthorized absence August 3 or 4 or up to 11:00 a.m. of the 5th, 1981 as a basis for dismissal. Any notice of proposed removal which specified activities on August 3 or 4 were incorrect and contrary to regional policy.

The FAA Region governing the Philadelphia Tower did not call or announce an operational necessity, a facility emergency

an operational emergency within the region.

The MSPB Presiding Official sustained the dismissal. The MSPB denied the employees' petition for review. The Court of Appeals affirmed and assessed counsel $500 in favor of the government "under the provisions of Rule 38, Fed.R.App.P."

REASONS FOR GRANTING THE WRIT

The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Court's power of supervision.

I.

In assessing a sum against petitioners' counsel under Rule 38 FRAP the Court of Appeals acted in conflict with a decision of this Court and the decisions of other courts of appeal and with arbitrary and capricious disregard of the law and the facts.

FRAP Rule 38 provides that if a Court of Appeals shall determine that an appeal is frivolous, it may award "just damages" and single or double costs to the appellee. Here the Court of Appeals "assessed" a sum but did not state how it arrived at it so as to reflect that the amount is "just". Furthermore, the court "assessed" the sum against the attorney despite the fact that Rule 38 does not refer to the attorney.

This assessment was made without notice and without an opportunity for a hearing and without a finding that the attorney had acted in bad faith as mandated in *Roadway Express Inc. v. Piper*, 447 U.S. 752, 767 (1980). *See also, Miranda v. Southern Pacific Transportation Co.*, 710 F. 2d 516, 522 (9th Cir. 1983); *Freeman v. Local Union No. 135*, 746 F. 2d 1316 (7th Cir. 1984).

In its per curiam opinion the Court of Appeals stated:

> "Counsel bases this entire appeal on an unfounded attack on the government, saying that the board's refusal to reinstate petitioner or to impose sanctions on the government (for failure to produce Philadelphia Tower Chief Beckelman for deposition and failure to strike Deputy Tower Chief Hamill's testimony) deprived petitioners of due process and Sixth Amendment rights. That assertion is part of an indiscriminate "blast of procedural objections" subtantially identical to that condemned in *DiMasso v. Department of Transportation, FAA*, 735 F. 2d 526, 527, n.3, 528 (Fed. Cir.), *cert. denied*, 105 S. Ct. 432 (1984), an authority blithely disregarded by counsel."

This statement is not in accord with the facts. Counsel did not base the entire appeal on an attack on the government. Petitioners' brief set forth the following "Statement of the Issues Presented for Review":

> "1. Were petitioners denied due process.
>
> 2. Did the deciding official have authority to dismiss.
>
> 3. Are petitioners Kapp, Newman and Robinson entitled to relief because they never received a notice of intent to remove.
>
> 4. Were petitioners on strike.
>
> 5. Were petitioners Kapp and Robinson dismissed for a reason other than alleged in the notice of intent.

6. Wa[illegible]otice of decision given petitioners Kitts, Neal and Newman effective."

Counsel presented arguments with respect to each of said issues. [*See* copy of "Summary of Argument" (55a) which had been included in Petitioners' Brief to the United States Court of Appeals.]

Although the court, in its opinion, partially addressed the first issue, it completely ignored all the other issues, all of which were based on facts adduced at the hearing and on citations of statutes, regulations and cases. None of these issues had been previously addressed by the court. As a matter of fact, one of the issues encompassed a matter specifically reserved by the court in *Adams v. Department of Transportation*, 735 F. 2d 488, 494, Note 5—whether the Presiding Official could take official notice of a strike.

Furthermore, counsel did not disregard *DiMasso v. Department of Transportation*. The full quotation from said case appears at p. 528 and is a follows:

> "DiMasso chose not to present evidence rebutting the charges of illegal strike participation and absence without leave; he instead chose to respond with 'a blast of procedural objections'."

In our case, all petitioners testified and presented evidence to rebut the charges. The *DiMasso* case has no relationship to the conduct of petitioners' counsel in this case. Furthermore, procedural objections can properly be raised because the law provides that they are grounds for relief. 5 U.S.C. § 7703(c) specifically directs the court to:

> " . . . review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be—. . . (2) obtained without procedures required by law, rule or regulation having been followed."

The court then goes on to cite the Presiding Official's rationale for denying sanctions for failure to produce Tower Chief Beckelman and then stated:

> "Counsel makes no attempt to show that view erroneous."

Here, again, the court's statement is not in accord with the facts. Counsel's brief at pp. 12-16 addressed this issue.

The court goes on to state that the government conceded that it's initial "refusal"[1] to produce Hamill for deposition was improper and that the "refusal" was based on policy denying access to Deputy Tower Chiefs, thus minimizing disruption involving only the Tower Chief in appeals; and that nothing of record indicates any attempt to hide Hamill's testimony. Here again, the court's statement is not in accord with the facts. The record reflects that the Agency did not "refuse" to produce Hamill—something it had no right to do in any event. The record reflects that the Agency willfully made a false statement so as to induce the Presiding Official not to direct Hamill's testimony and to induce petitioners' counsel not to seek his deposition *supra* at p. 8). It wilfully deceived the Board's Presiding Official.

The Court of Appeals went on to say:

> ". . . following the initial refusal, the government

---

1. A word used by the Presiding Official.

> specifically and repeatedly informed all petitioners of its intent to use Hamill's testimony, submitting a proposed witness list which included Hamill's name seven months before the hearing. In May 1982, and six months before the hearing, the Agency offered Hamill for deposition, having recognized that Beckelman could not be produced."

Here, again, the court's statement is not in accord with the facts. The listing of witnesses was related to all Philadelphia cases and not specifically to petitioners in this case. Hamill's name was listed with Beckelman's and others who were not called. Beckelman could have been produced. There is no evidence that Beckelman refused to testify. At the very least the government could have subpoened him to sustain its burden of proof. On the other hand, the Agency disobeyed an order of August, 1982 by the presiding official which required a listing of witnesses for the particular cases. The Agency listed no witnesses in response to this order and the presiding official refused to impose sanctions. This was called to the attention of the court with citations to the record.

Aside from these inaccuracies, the fact remains that the court does not find that the Agency changed its representation with respect to Hamill's lack of knowledge. What it comes down to is that the court finds that the Agency offered Hamill for deposition concerning matters about which it represented that he had no knowledge and that counsel should have deposed Hamill despite the fact he was supposed to have no knowledge. Why would an attorney depose a person who has no knowledge?

The court states that counsel fully cross examined Hamill. The fact is, as argued in petitioners' brief, Hamill, in fact, lacked knowledge about crucial elements and was permitted to testify about matters of which he had no personal knowledge.

Counsel stated in his brief:

> "This is a proceeding based on an alleged crime. The penalty is economic death. Under the Sixth Amendment, the person accused of a crime is entitled to be confronted with the witnesses against him. This is simple justice and due process. Here, appellants were not confronted with the witnesses. Instead of calling Beckelman and the supervisors who had knowledge, Hamill, the person who had been represented as knowing nothing, was permitted, over objection, to testify as to anything and everything regardless of his lack of knowledge. True cross-examination was impossible. How can you cross examine a witness about what another person said or saw? Hamill was thus free to say anything. The less personal knowledge he had, the freer he was to testify. Since the presiding official disregarded rules of evidence on the grounds that he would give it the weight it deserved, Petitioners had no way of knowing what evidence had to be contradicted and what would be ignored."

The court further overlooked the fact that in April, 1982, the Presiding Official had directed the deposition of Beckelman by May 31, 1982 and the Presiding Official's superiors mandated completion of discovery by that date. When the Agency failed to produce Beckelman, petitioners' moved for sanctions June 4, 1982, granting the appeal. Despite the fact that the Agency did not oppose the motion, the Presiding Official took no action on the motion until the day before the hearing, at which time he advised petitioners' counsel orally that the motion was denied (*supra*, pp. 7, 8). Petitioners' brief indicated the following at p. 16:

> "The Presiding Official further goes out of his way to protect the agency by stating that he had previously indicated, in connection with other employees, that if requested he would issue a subpoena for Beckelman and order Hamill deposed. This is a gratuitious unsubstantiated statement. The time for discovery had ended May 31, 1982. An oral decision denying the motion was conveyed to Petitioner's attorney no earlier than the day before the hearing (APP 43). Why would he have offered to issue a subpoena when he had not acted on the motion?
>
> The Presiding Official's opinion completely ignored Petitioners' allegation that the false statement re Hamill constituted a crime. He also refused Petitioners' request at the hearing that he should refer the matter to the Department of Justice for prosecution. He failed to notify all other litigants that they had been imposed upon so that they might take appropriate action to protect their interests—this despite the fact that Petitioners' attorney urged him to do so. (APP 54-57)"

The court found counsel's allegations against the Presiding Official unjustified, meritless and offensive. The fact is that the allegations were made in good faith and based on citations to the record. The court's errors of fact set forth above indicate that the court did not "review the record" carefully.

Amazingly, the court condoned the misconduct of the government and punished petitioners' counsel for bringing said misconduct to the attention of the court. It emulated the ancient custom of punishing the messenger who brought bad tidings.

The court accepted and condoned a standard of conduct at variance with established standards reflected in the federal rules and the criminal statutes as well as the standards enunciated by the Supreme Court.

The court overlooked the fact that MSPB Regulation 5 C.F.R. 1201.72(a) provides that the Federal Rules of Civil Procedure may be used as a general guide for discovery practices. The court also overlooked the fact that the FRCP evidences a standard of honesty and obedience which was violated. FRCP Rule 11 provides sanctions for false statements. Rule 37(b) provides sanctions for failure to produce a witness for discovery.

The court stated in *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 763-764 (1980):

> "Rule 37 sanctions must be applied diligently both 'to penalize those whose conduct may be deemed to warrant such a sanction, [and] to deter those who might be tempted to such conduct in the absence of such a deterrent.' "

The court also overlooked the fact as argued by petitioners' counsel in his brief, that the false statements constituted violations of 18 U.S.C. § 1001 and 18 U.S.C. § 1505—criminal statutes. *United States v. Bramblett*, 348 U.S. 503 (1955); *United States v. Massey*, 550 F. 2d 300 (5th Cir. 1977); *United States v. Abrams*, 427 F. 2d 86 (2nd Cir. 1970), *cert. denied*, 400 U.S. 832; *United States v. Batten*, 266 F. Supp. 492 (D.C. Cir. 1964), *cert. denied*, 380 U.S. 912, *rehearing denied*, 381 U.S. 930.

Since the Agency wilfully deceived the Board and engaged in conduct utterly inconsistent with the orderly administration of justice, the court should have decided in favor of petitioners.

In *Mesarosh v. United States,* 352 U.S. 1, 14 (1956) the court stated:

> "This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of the federal courts.[9] If it has any duty to perform in this regard, it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity." [Footnote omitted.]

It then went on to quote from a case involving an administrative proceeding:

> " 'The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts. This Court is charged with supervisory functions in relation to proceedings in the federal courts. See McNabb v. United States, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819. Therefore, fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted.' Communist Party v. Subversive Activities Control Board, 351 U.S. 115, 124, 76 S.Ct. 663, 668."

See also, Wyle v. R. J. Reynolds, 709 F. 2d 585, 589 (9th Cir. 1983).

II.

The deciding official lacked authority to dismiss the petitioners.

This argument was made to the Court of Appeals but was not addressed by the court.

It is elementary that the law and regulations contemplate actions by authorized persons. A person not authorized to act may not dismiss anybody. *Cf., Federal Crop Insurance Corp. v. Merrill,* 332 U.S. 380, 384 (1947). This is jurisdictional and has no relation to the question as to whether any petitioner was on strike. As set forth above under the pertinent regulation, the person who dismissed the employees-petitioners had no authority to act.

The Supreme Court has held that a defendant must be judged upon the evidence in his own trial and not upon the evidence in another trial. Thus, it stated in *Noto v. United States,* 367 U.S. 290, 299 (1961):

> "it is upon the particular evidence in a particular record that a particular defendant must be judged, and not upon the evidence in some other record."

The Court of Appeals has also held that its decision must be based on a review of the record. *Adams v. Department of Transportation,* 735 F. 2d 488, 494 (1984). The statute, 5 U.S.C. § 7703(c) mandates review of the record.

Furthermore, the notice of intent to dismiss petitioner Newman involved a specification date of August 3, 1981.

As set forth above there was no authority to make specifications of striking or unauthorized absence on August 3

and 4 or up to 11:00 a.m. on the 5th of August 1981 as a basis for proposed removal and there was no authority to dismiss anyone for unauthorized absence.

Accordingly, on the basis of the record of this case, the removal of Newman was unauthorized for that reason too.

III.

Failure of Notice.

The argument relative to failure to give notice was made to the Court of Appeals but not addressed by the court.

The statute in relevant part provides for a written notice "stating the specific reasons for the proposed " dismissal and "a reasonable time but not less than 7 days" for the employee to answer. 5 U.S.C. § 7513.

The Office of Personnel Management (OPM) was authorized to issue regulations. 5 U.S.C. § 7513(a). In 5 C.F.R. 752.404 OPM implemented 5 U.S.C. § 7513(b), stating:

> "(a) Statutory Entitlements. An employee against whom action is proposed under this subpart is entitled to the procedures provided in 5 U.S.C. 7513(b)."

It then proceeded to set forth the entitlements which include the notice requirements.

It is emphasized that these are entitlements recognized by the office authorized by the statute to implement the statute. These statutory entitlements involve actions the Agency must take. These entitlements are not dependent on any request by the employee.

These actions must be taken and entitlements afforded by the Agency without any request by the employee. Failure to afford the employee these entitlements constitutes a violation of law and the MSPB is required to grant relief in such event under its mandate not to sustain agency action where the decision is not in accordance with law. 5 U.S.C. § 7701(c)(2). The Court of Appeals must grant relief under its mandate to set aside an action obtained without procedures required by law, rule or regulation having been followed. 5 U.S.C. § 7703(c).

Failure to give any notice is not only a violation of the statute but is a violation of the due process mandated by the First Amendment and warrants relief regardless of any other elements of the case. *Cf., Cleveland Board of Education v. Loudermill,* 53 LW 4306.

Since neither Robinson, Newman nor Kapp received any notice they are entitled to relief on this ground alone.

Furthermore the Presiding Official found that except for Neal, the petitioners received less than seven days' notice but held that there was no harmful error and that the failure to give at least seven days' notice did not warrant relief. The Court of Appeals, in other cases, has adopted this position. It is submitted that this position is erroneous.

Under the plain terms of the statute, harmful error need be shown only in the case of the Agency's procedures — in this case the procedures of FAA. This is exactly how the Agency charged with with administering the law (MSPB) interpreted the law long before it was called upon to consider the validity of the FAA action in firing the air controllers. Thus, the MSPB in its regulations at 5 C.F.R. 1201.56(c)(3) set forth the following definition:

> "Harmful error. Error by the agency in the application of its procedures which, in the absence or cure of the error, might have caused the agency to reach a conclusion different from the one reached."

This interpretation should be given great weight. *United States v. Jackson,* 280 U.S. 183 (1930); *United States v. Alabama R.R.,* 142 U.S. 615, 621 (1892). The OPM and MSPB regulations have the force of law. *United States v. Nixon,* 418 U.S. 683 (1974).

The language of the statute is unambiguous and must be enforced as written. Even if Congress had intended otherwise, the law cannot be altered. *Caminetti v. United States,* 242 U.S. 470, 485, 490 (1970). According to the plain language of the statute, the concept of harmful error applies only to the *agency* procedures, *i.e.,* the procedures of the Federal Aviation Administration. It does not apply to violations of the law or regulations issued by OPM in implementing the law.

It is recognized that adherence to the plain language of the law might have resulted in the reversal of many dismissals of those who appealed. However, it is not the function of the administrative or judicial process to protect government action which violates the law. *Immigration and Naturalization Service v. Chadha,* 462 U.S. 919, 944 (1983).

Under the MSPB concept of harmful error, the Agency having made up its mind to dismiss petitioners, did not have to give petitioners seven days or any amount of notice or comply with any other of the requirements of the statute. Since the Agency would have dismissed petitioners regardless of anything they may have said or done, there could be no harmful error in denying them any of the statutory entitlements. Under the Board concept. the Agency might very well have dispensed with a notice of

proposed action or any right of the employee to answer charges. It could merely have dismissed the employee by fiat without any concept of due process. This may be the jurisprudence of a dictatorship, but it is not American jurisprudence. In the United States, the government too must obey the law and take action in accordance with due process provided by law. Even the President of the United States must obey the law. *United States v. Nixon*, 418 U.S. 683 (1974).

IV.

Petitioners were not on strike.

This is another argument made to the Court of Appeals but not addressed by that court.

The notice of intent to remove specified striking beginning as follows:

Robinson	— 1500 August 6, 1981
Kitts	— 0700 August 6, 1981
Newman	— 1512 August 3, 1981
Neal	— 1512 August 6, 1981
Kapp	— 1512 August 6, 1981

As set forth above the dismissal of Newman with a specification of August 3, 1981 was not authorized.

The Court of Appeals has held that the Agency must prove: (1) that a strike was in progress on the date striking is charged; and (2) that the employee could have returned to work on that date. *Adams v. Department of Transportation*, 735 F. 2d 488, 493 (1984).

Here the Presiding Official over petitioners' objection, relied solely on "official notice" that the strike lasted through August 6, 1981.

It is submitted that there was no basis for taking official notice. The Court of Appeals has recognized that the strike ended at different times at different centers and noted that the issue of official notice was neither raised nor decided in the lead cases. *Adams v. Department of Transportation,* 735 F. 2d 488 (1984) at p. 494 note 5.

The Agency did not submit evidence of the continuance of the strike as in *Adams v. Department of Transportation, supra.* Nor was there any claim by the petitioners that there was any confusion as to when the strike ended as was alleged in the latter case. As a matter of fact petitioners claimed there was no confusion and submitted evidence to prove that the Agency regarded the strike as over 11 a.m. August 5, 1981 as did petitioners.

All of the petitioners testified they believed the public announcements by the President, the Secretary of Transportation and the FAA Administrator that the strike was over 11 a.m. August 5, 1981. There was no confusion here. The highest authorities declared the strike over. The petitioners believed them and relied on their statements and the Agency is estopped and bound thereby. The Agency had the burden of proof that the strike was in existence. The highest officials stated and proved otherwise. On the record in this case there was no strike after 11:00 a.m. on August 5, 1981.

The petitioners must be judged upon the evidence in their record and not upon the evidence in another record. 5 U.S.C. § 7703(c); *Noto v. United States,* 367 U.S. 290, 299 (1961); *Adams v. Department of Transportation,* 735 F. 2d 488, 494 (Fed. Cir. 1984).

It is emphasized that in the pertinent FAA Region there was no authority to dismiss anybody for unauthorized absence.

V.

Petitioners Kapp and Robinson were improperly dismissed for a reason other than alleged in the notice of intent.

This argument was made to the Court of Appeals but not addressed by the court.

Kapp was charged with unauthorized leave on the 1512 shift, August 6, 1981. Although there is such a shift, he was not in fact scheduled for that shift. He was scheduled for another shift.

Robinson was charged with unauthorized leave on the 1500 shift, August 6, 1981. Although there is such a shift, he was not in fact scheduled for that shift. He was scheduled for another shift.

In neither case was it a matter of incorrectly describing the right shift. In both cases, the charges were for the wrong shift. Thus, neither Kapp nor Robinson were AWOL or on strike as charged.

In arriving at its decision, the Agency could consider only the reasons specified in the notice of proposed action. 5 C.F.R. 752.404(f) (47a). The propriety of the actions must be judged solely by the grounds invoked by the Agency. This is elementary due process. *Cf., Cleveland Board of Education v. Loudermill*, 53 L.W. 4306. Appellants must be fired for valid reasons or not at all. *Horne v. Merit Systems Protection Board and Interstate Commerce Commission*, 684 F. 2d 155, 157, 159.

The Supreme Court stated in *Motor Vehicle Manufacturers Association v. Farm Mutual Automobile Insurance Co.*, 463 U.S.

29, 50 (1983):

> "It is well established that an agency's action must be upheld if at all, on the basis articulated by the agency itself."

VI.

The decisions removing petitioners Kitts and Neal were not effective.

This argument was made to the Court of Appeals but not addressed by the court.

As set forth above, Kitts was removed effective August 21, 1981 by a letter received August 25, 1981; Neal was removed effective August 21, 1981 but did not receive the letter of removal.

As set forth above OPM is the Agency designated to implement the statute and its regulations have the force of law. OPM mandated that the Agency deliver the notice of decision to the employee at or before the effective date of the action and that said notice tell the employee of his appeal rights. 5 C.F.R. 752.404(f) (47a). If it arrives after the effective date the removal is not effective. A new notice must be sent. The FAA itself directed that where the removal letter arrived after the effective date of removal, a revised letter of removal should be sent with a new effective date of removal. It is submitted that the removal of Kitts and Neal was not effective.

VII.

An improper rule of evidence was applied.

This argument was made to the Court of Appeals but not addressed by that court.

The MSPB Presiding Official established a special rule of evidence applicable solely to the petitioners. Their evidence had to be "objective". On the other hand the Presiding Official rationalized the misconduct of the Agency; permitted Hamill to testify as to any matter regardless of whether he had personal knowledge; and did not require the Agency to call witnesses identified by petitioners as having personal knowledge favorable to petitioners.

Petitioners were in a catch-all situation. If they had not testified they would have been deemed to have admitted guilt. Having testified they were not believed.

Robinson, Kitts and Kapp were sick at the times in question and therefore entitled to sick leave. 5 C.F.R. 630.401 (47a); *Hockman v. American Bible Monuments Commissions,* 11 MSPB 246 (1982). Each so testified. Kitts and Kapp submitted doctors statements. Agency records showed Kapp had been on approved sick leave from July 21 to July 26, 1981.

The Presiding Official went so far as to find Kapp's doctor unqualified. He set his expertise against that of the doctor. In this connection *compare Van Horn v. Schweiker,* 717 F. 2d 871, 874 (3rd Cir. 1983).

In refusing to accept the uncontradicted evidence of the petitioners that they were sick, the MSPB ignored its own decision in *Hockman v. American Bible Monuments Commission, supra.*

The uncontradicted evidence of the petitioners should have been accepted. *Duvall v. United States,* 647 F. 2d 131, 134 (Ct. Cl. 1981). The court should also have followed its own concept set forth in *Adams v. Department of Transportation,* 735 F. 2d 488, 492 (C.A. Fed. Cir. 1984) where it stated:

> "The law and experience teach that a striker can be expected to refrain from falsely testifying under oath that his absence was due to non-strike reasons".

CONCLUSION

The assessment against the attorney was improper and the employees-petitioners were improperly dismissed.

It is submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

HARRY SHARGEL
Attorney for Petitioners

APPENDIX A—ORDER DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 85-988

THOMAS D. ROBINSON, ET AL.,

Petitioners,

v.

THE DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION,

Respondent.

O R D E R

A petition for rehearing having been filed in this case,

UPON CONSIDERATION THEREOF, it is Ordered by the court that the petition for rehearing be, and the same is hereby, Denied.

FOR THE COURT:

s/ Francis X. Gindhart

Francis X. Gindhart, Clerk

September 9, 1985

cc: Harry D. Shargel
Stephen J. McHale

APPENDIX B—DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 85-988

THOMAS D. ROBINSON, et al.,

Petitioners,

v.

DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION,

Respondent

DECIDED: July 31, 1985

Before MARKEY, *Chief Judge*, RICH and SMITH, *Circuit Judges*.

PER CURIAM.

The decisions of the Merit Systems Protection Board (board), Nos. PH075281F0991, PH075281F1001, PH075281F1002, PH075281F1008, and PH075281F1107, sustaining the removal of Richard V. Kitts, John E. Neal, Richard C. Newman, Thomas D. Robinson, and Robert L. Kapp, on charges of participating in an illegal strike against the United States Government and unauthorized absence, are affirmed and a sanction is imposed on counsel.

Appendix B

Analysis

After thorough review of the record, briefs, and submissions, we conclude that the Department of Transportation, Federal Aviation Administration, established a prima facie case of strike participation and unauthorized absence, and that petitioners failed to rebut that showing or to demonstrate harmful procedural error.

Counsel bases this entire appeal on an unfounded attack on the government, saying that the board's refusal to reinstate petitioner or to impose sanctions on the government (for failure to produce Philadelphia Tower Chief Beckelman for deposition and failure to strike Deputy Tower Chief Hamill's testimony) deprived petitioners of due process and Sixth Amendment rights. That assertion is part of an indiscriminate "blast of procedural objections" substantially identical to that condemned in *DiMasso v. Department of Transportation, FAA*, 735 F.2d 526, 527 n.3, 528 (Fed. Cir.), *cert. denied*, 105 S. Ct. 432 (1984), an authority blithely disregarded by counsel.

The Presiding Official denied sanctions for failure to produce Tower Chief Beckelman, saying "the crucial fact . . . is that Beckelman was not, at the time he was requested for deposition, a federal employee. He was, therefore, no longer associated with the agency that was a party, nor was he a party himself, and the agency was not obligated to produce him." Counsel makes no attempt to show that view erroneous.

The government conceded that its initial refusal to produce Hamill for deposition was improper. That refusal was based on a uniform policy denying access to Deputy Tower Chiefs, thus minimizing disruption by involving only the Tower Chief in Air Traffic Controller appeals. Nothing of record indicates any attempt

to hide Hamill's testimony, a strategy as much contrary to the government's interests as to petitioners'. Indeed, following the initial refusal, the government specifically and repeatedly informed all petitioners of its intent to use Hamill's testimony, submitting a proposed witness list which included Hamill's name seven months before the hearing. In May 1982, six months before the hearing, the agency offered Hamill for deposition, having recognized that Beckelman could not be produced.

Counsel's assertions of unfair surprise are thus disingenuous. Counsel could have obtained Beckelman's testimony. The Presiding Official offered to grant a motion for an order under 5 CFR 1201.81. See also 5 CFR 1201.74. Moreover, counsel fully cross-examined Hamill at the hearing. The Presiding Official's refusal to impose sanctions or strike Hamill's testimony was neither error, nor an abuse of discretion.

Without the slightest justification, counsel asserts that the Presiding Official: was biased against all petitioners; permitted the government to employ criminal conduct, the remotest hearsay, phony and withheld documents; failed to call witnesses with actual knowledge; protected and defended the government; and disregarded the rules of evidence. Counsel further says the Presiding Official relied on "the remotest hearsay introduced by a liar, perjurer, and forger [Hamill]", whereas he "should have accepted the uncontradicted testimony and documents of Petitioners."

Counsel's utterly meritless raillery against the Presiding Official is offensive. It wastes the resources of this court, which has carefully reviewed petitioners' arguments and the record "on the possibility that a non-frivolous contention might have been found lurking." *See Bowen v. Department of Transportation,*

FAA, No. 83-799 (Fed. Cir. July ____ 1985). It wastes the resources of government counsel, who must diligently respond to each baseless allegation. Most destructive to the equitable and efficient administration of justice, however, is that counsel's conduct has delayed deserving litigants in obtaining their statutory and constitutional right to judicial review. This appeal is clearly frivolous. *See Griessenauer v. Department of Energy*, 754 F.2d 361 (Fed. Cir. 1985); *Moir v. Department of the Treasury*, 754 F.2d 341 (Fed. Cir. 1985).

We affirm on the basis of the board's opinion because we do not find that the board's decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or that it was obtained without procedures required by law, rule, or regulation having been followed, or that it was unsupported by substantial evidence. 5 U.S.C. § 7703(c) (1982). *See Kochanny v. Bureau of Alcohol Tobacco & Firearms*, 694 F.2d 698, 700 n.3 (Fed. Cir. 1982).

Under the provisions of Rule 38, Fed.R.App.P., counsel Harry D. Shargel is assessed in favor of the government the sum of $500. *See Cecil v. Department of Transportation, FAA*, No. 83-1168 (Fed. Cir. July 12, 1985) and *Kump v. Department of Transportation, FAA*, No. 85-931 (Fed. Cir. July 12, 1985).

AFFIRMED

APPENDIX C—OPINION AND ORDER OF THE MERIT SYSTEMS PROTECTION BOARD

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DOCKET NUMBER PH075281F1008

THOMAS D. ROBINSON, ET AL.

v.

DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION

OPINION AND ORDER

Appellants[1] have timely petitioned for review of the initial decision issued January 31, 1983, in which the presiding official of the Board's Philadelphia Regional Office upheld the decision of the Department of Transportation's Federal Aviation Administration (agency) to remove appellants. The removal was based on participation in a strike against the Federal Government and unauthorized absence (absence without leave or AWOL).

Appellants first contend in their petition for review that the presiding official erred by not imposing sanctions on the agency for failing to produce one former agency official, the tower chief for deposition or for the hearing, and for misstating the knowledge of another agency official who was the agency's primary witness.

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1. This appellant's appeal was consolidated with those of five others for hearing, and an initial decision was issued covering all appellants. The petition for review includes all six appellants, who are listed by name and MSPB Docket Number in Appendix A to this Opinion.

Appendix C

The appellants further assert that the agency's failure to produce the tower chief as a witness violated their sixth amendment right to confront the witnesses against them. We find these contentions to be without merit. As the presiding official noted in his initial decision, the appellants failed to follow the appropriate procedures for the deposition of the tower chief or for his subpoena as a witness. *Initial Decision* at 3; 5 C.F.R. § 1201.81. In view of the appellants' failure in this regard, we agree with the presiding official's conclusion that sanctions against the agency were inappropriate. *See* 5 C.F.R. § 1201.43(a) and *Adams v. Department of Transportation,* MSPB Docket Number NY075281F0424 at 3-5 (April 25, 1983).

Appellants' contention that the tower chief lacked authority to remove them is based on a superseded agency order and is, therefore, without merit. The unrebutted testimony of an agency official also establishes that the tower chief was delegated the authority to remove appellants. Hearing Transcript at 47.

Appellants also contend that the agency committed numerous harmful errors in that the agency's proposed removal notice was labeled as a Letter of Intent and provided that the appellants could reply personally or in writing or both, rather than orally or in writing or both; the agency charged two of the appellants with striking and AWOL for the wrong shifts; the appellants were allegedly denied official time to review the agency records; and some appellants allegedly did not receive their proposed removal notices and decision notices until after the effective dates of the actions. We find these contentions to be without merit. The record establishes that the agency's action in misstating the appellants' scheduled shifts was a matter of 12 minutes, and that all of the appellants made replies to the charges and timely filed appeals with the Board. Thus, the presiding official correctly found that

appellants failed to establish that these alleged procedural errors were harmful, as required under the Board's holding in *Parker v. Defense Logistics Agency*, 1 MSPB 489, 492-93 (1980).

Appellants also challenge the propriety of the removal penalty and assert that the presiding official erred in finding that no penalty other than removal was appropriate for a sustained charge of striking. *Initial Decision* at 16. In *Schapansky v. Department of Transportation*, MSPB Docket Number DA075281F1130 at 9 (October 28, 1982), we did not decide whether, as a matter of law, mitigation of the penalty is foreclosed under 5 U.S.C. § 7311(3). The presiding official in the present case correctly found, however, that removal was an appropriate penalty in light of the seriousness of appellants' offenses and that the penalty promotes the efficiency of the service. *See Schapansky, id.*, at 11.

The Board, having fully considered the petition for review of the initial decision and finding that it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, hereby DENIES the petition.[2]

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2. The Board has resolved the other issues raised in the petition for review by the appellants in the following cases: *Noa v. Department of Transportation*, MSPB Docket Number NY075281F0697 at 7 (April 25, 1983) (consolidation of appeals of former air traffic controllers); *Bandy v. Department of Navy*, 4 MSPB 295 (1980) (allegations of bias against presiding officials); *Siebert v. Department of Health, Education, and Welfare*, 4 MSPB 132 (1980) (whether there is a denial of due process if the proposing and deciding officials are the same person); *Martel v. Department of Transportation*, MSPB Docket Number BN075281F0558 at 3-13 (April 25, 1983) (constructive suspension); *Anderson v. Department of Transportation*, MSPB Docket Number SL075281F0347 at 6 n.9 and 7-8 (April 25, 1983) (absence during grace period and confusion regarding deadline shift); *Ketchem v. Department of Transportation*, MSPB Docket Number DA075281F0713 at 9 (May 28, 1982) *motion for clarification*

(Cont'd)

Appendix C

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. § 1201.113(b).

The appellants are hereby notified of the right to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N. W., Washington, D. C. 20439. The petition for judicial review must be filed no later than thirty (30) days after the appellants' receipt of this order.

FOR THE BOARD:

AUG 19, 1983

s/ Kathy W. Semone for
Robert E. Taylor
Secretary

Washington, D.C.

(Cont'd)
denied (November 23, 1982) (official notice of the existence of an unlawful strike); *Schapansky, supra,* at 6 n.2 and 7-8 (*prima facie* case of strike participation and invocation of 5 U.S.C. § 7513(b)(1) to shorten the notice period); *Desiderio v. Department of the Navy,* 4 MSPB 171 (1980) (AWOL alone as cause for removal); *Baracco v. Department of Transportation,* MSPB Docket Number DC075281F0895 at 16 (April 25, 1983) (appellant afforded less than 7 days to respond to removal proposal); *Campbell v. Department of Transportation,* MSPB Docket Number DE075281F0674 at 12-16 (April 25, 1983) (readmission to agency facility); *Anderson, supra,* at 8-13 (effect of the "command influence" on the discretion of the deciding official); *Noa, supra,* at 13 (whether group activity is required for a finding of strike participation); and *Weaver v. Department of the Navy,* 2 MSPB 297, 299 (1980) (due deference to credibility findings of presiding officials); *Baracco, supra,* (need for showing of harm in alleged procedural irregularities).

APPENDIX D—OPINION AND DECISION OF THE MERIT SYSTEMS PROTECTION BOARD

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
PHILADELPHIA REGIONAL OFFICE

THOMAS D. ROBINSON, ET AL.

v.

DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION

Initial Decision Numbers:

PH075281F0991 (Kitts)
PH075281F0978 (Clarke)
PH075281F2008 (Robinson)
PH075281F1002 (Newman)
PH075281F1001 (Neal)
PH075281F1107 (Kapp)

Date: January 31, 1983

INTRODUCTION

All six of the appellants involved in this appeal were employed as air traffic control specialists at the Philadelphia International Tower, Philadelphia, Pennsylvania, prior to August 3, 1981. All six were subsequently removed from their positions by the Department of Transportation, Federal Aviation Administration (F.A.A.), for their alleged participation in the August, 1981 nationwide strike by the members of the Professional Air Traffic Controllers Organization (hereinafter PATCO). Each appellant was also charged with being absent without leave (AWOL) for

several days during the early weeks of August, 1981. Each appellant filed a timely appeal of his dismissal, and the appeals were consolidated pursuant to 5 C.F.R. Section 1201.36(b). The consolidated hearing in this matter took place in Philadelphia, Pennsylvania on September 21-22, 1982.

JURISDICTION

An employee may appeal to the Merit Systems Protection Board from any action, which is made appealable to the Board under any law, rule, or regulation, 5 U.S.C. Section 7701(a). The law provides that an employee in the competitive service who is not serving a probationary period may appeal an action removing him from the Federal service, 5 U.S.C. sections 7511(a)(1)(A), 7512(1) and 7513(d). The record shows that the appellants were employees in the competitive service, that they were not serving in probationary periods, and that they were removed from their positions with the Department of Transportation. Accordingly, I find that these appeals are acceptable for adjudication.

ANALYSIS AND FINDINGS

In order to have its removal decision sustained, the agency has the burden of establishing the reason for the action by a preponderance of the evidence, 5 U.S.C. Section 7701(c)(1)(B). This is defined as:

> That degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

Appendix D

5 C.F.R. Section 1201.56(c)(2).

The agency stated that the reasons for the instant action were in letters which were nearly identical except for the particular specifics of time and dates applicable to each appellant. The specific times and dates will be dicussed in connection with each individual appellant, but the general form read as follows:

> *Reason 1*: Violation of 5 U.S.C. 7311, which states in pertinent part, "An individual may not accept or hold a position in the Government of the United States . . . if he . . . participates in a strike against the Government of the United States . . ."; and 18 U.S.C. 1918, which makes participation in a strike against the government of the United States a crime for which a sentence of imprisonment can be imposed.
>
> *Specification*: Beginning at approximately 7 A.M. EDT, on August 3, 1981, a nationwide strike by air traffic controllers occurred. Beginning at ____ EDT, on August ____, 1981 when you failed to report for duty, until the present, you participated in a strike against the United States Government.
>
> *Reason 2:* Unauthorized Absence
>
> *Specification:* Beginning first at the ____ to ____ shift on August ____, 1981, you failed to report for your scheduled tour of duty. On August ____, 1981 you were sent a telegram that an illegal strike was in progress, and that you must return to duty for your regularly scheduled shift. You failed to

return to duty, and instead remained absent without authorization.

The agency, in seeking to prove its case against appellants, relied heavily on the testimony of Thomas P. Hamill, who was, at the time of appellants removal, Deputy Chief at the Philadelphia International Tower.

The appellants sought alternate sanctions against the agency. Specifically, the appellants made a motion that they be granted judgment because of the agency's failure to produce for deposition, or as a witness, Chief of the Philadelphia International Tower, Robert J. Beckelman, Jr. In addition, the appellants have moved that they be granted judgment, or in the alternative, that the testimony of Mr. Thomas Hamill be stricken, because of the agency's shifting representations as to the knowledge of Mr. Hamill had about the events under examination.

The appellants have cited *Fuller v. Department of the Treasury,* MSPB Order No. SF07528090107 (January 28, 1982), as authority for the appropriateness of sanctions in the instant appeal. Moreover, the appellants have questioned the veracity of the agency's representations on Mr. Beckelman's alleged illness. However, the crucial fact in this motion is that Beckelman was not, at the time he was requested for deposition, a federal employee. He was, therefore, no longer associated with the agency which was a party, nor was he a party himself, and the agency was not obligated to produce him. *See* 5 C.F.R. Section 1201.33; 5 C.F.R. Section 1201.72. I note that appellants could have requested Mr. Beckelman for deposition or as a witness by the subpoena process provided for in 5 C.F.R. Section 1201.81.

The appellants originally requested that the agency provide

Appendix D

Thomas P. Hamill, the Deputy Chief at the Philadelphia International Tower, for purposes of deposition. The agency refused to produce the deputy chief of the Philadelphia International Tower stating that the deputy tower chief had no information relevant to the matter before the Board. Subsequently, the agency produced Hamill as its only witness at appellants' hearing.

Appellants argue that the agency made a false statement, and that an appropriate sanction for such conduct should be judgment for the appellants, or the striking of Hamill's hearing testimony.

The agency stated that its representation that Hamill had no information on the matter under appeal was contained in a standardized response to a large number of requests from various appellants throughout the agency's Eastern Region for the deposition of a large number of agency officials including the Secretary of Transportation. The agency contends that due to the impact the strike had upon its operations, it attempted to avoid depositions of any of its personnel other than Facility Chiefs. The method used was a generalized response that the Facility Chiefs were the individuals with the most knowledge concerning the adverse actions. The agency concedes that its statement that Hamill knew nothing about the actions was not applicable and should not have been offered.

However, the agency points out that when, in May 1982, Mr. Beckelman could not be produced for purposes of deposition, the agency offered Hamill for that purpose. I note that as long ago as April 1, 1982, the agency submitted a proposed witness list which included the name of Thomas P. Hamill. Moreover, Hamill's name appears on the letter of proposed removal as the individual the appellants should contact in order to review the

material used to support the proposed actions. In view of the foregoing, I find, since that aside from the one denial by the agency, it otherwise indicated that Hamill did have knowledge of the action under appeal; and, it did offer him for the purposes of deposition, no sanctions of any kind are appropriate with respect to Hamill and his testimony will be permitted to stand.

I note that the representative of the instant group of appellants had made the same motions during the course of the two hearings conducted in August 1981. At that time, I indicated that, if requested, I would issue a subpoena for Beckelman and order Mr. Hamill deposed, and the agency indicated it would not oppose this procedure. Appellants' representative declined to avail himself of this opportunity, and I must regard him as having been on notice that this procedure was available in the instant cases.

Appellants have alleged that the agency committed a number of harmful errors in the processing of their removals.

5 U.S.C. Section 7701(c)(2) provides that an agency's decision may not be sustained by the Board if "the employee . . . (A) shows harmful error in the application of the agency's procedures in arriving at such decision . . " The statute places upon the appellant the burden of establishing as an affirmative defense that the agency committed procedural error and that the error was harmful. *See William E. Parker v. Defense Logistics Agency,* 1 MSPB 489 (1980).

The Board indicated in *Parker, supra*, that harmful error concept could be stated as follows:

> The question is whether it was within the range of appreciable probability that the error had a

> harmful effect upon the outcome before this agency.

5 C.F.R. Section 1201.56(c)(3) provides a definition for harmful error which is as follows:

> Error by the agency in the application of its procedures which, in the absence of a cure of that error might have caused the agency to reach a conclusion different than the one reached.

This section places the burden upon the appellant to show that the error was harmful.

Appellants argued that there was harmful procedural error in that the agency issued appellants a Letter of Intent rather than a Letter of Proposal. Appellants contended that there is a difference between a Letter of Intent and a Letter of Proposal in that the former implies a fixed purpose whereas the latter is only tentative and can be altered. The question of whether there was prejudgement in the instant case will be addressed below, and that issue aside, the appellants' representations with respect to whether a Letter of Intent or a Letter of Proposed Action was issued is a matter of semantics. In form, the letters to appellants from Mr. Beckelman were Notices of Proposed Removal, in that they informed appellants of the reasons why the actions were being proposed, designated a place where they could review the material that the agency had relied on, and, otherwise outlined appellants' rights if they wished to dispute the merits of the action. The terms "proposed action" or "proposed removal" appear several times in the course of the letters. On August 11, 1981, appellants responded to what they characterized as the "proposed removal action" and the "proposed action," in such a way as to

demonstrate that they regarded the letters as proposals, each raising various issues and questions with respect to them, showing an awareness they could dispute the proposed actions.

Since the letters were on their faces, Letters of Proposed Removal, and, since appellants have not shown how this mislabeling caused the agency to reach decisions different from that which it did, I find no harmful error in these cases.

Appellants also alleged that there was harmful error in these cases in that the proposing official and the deciding official was the same person, Robert J. Beckelman, Jr. Appellants assert that unless there are separate individuals to perform the functions of proposing official and deciding official, there is a denial of due process. There was, prior to the passage of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978), a requirement that a final decision on an adverse action be made by a higher ranking official than the proposing official. *See* 5 C.F.R. Section 752.202(f)(1978). However, neither that law, nor the regulations issued to implement it, mandate such a two stage system at the agency level. *See* 5. C.F.R. Part 752 (1981). *See also Sibert v. Department of Health, Education, and Welfare*, 4 MSPB 132 (1980); *Miller v. Department of the Air Force*, MSPB Order No. BN075209070 (November 30, 1981); *McGee v. Department of Health and Human Services*, MSPB Order No. AT07528110274 (April 14, 1982); *O'Neil v. Department of Transportation*, MSPB Order No. BN07528110063 (June 21, 1982); *Pinto v. Department of Labor*, MSPB Order No. DE0752800140 (May 11, 1982). Since neither the law nor the applicable regulations require that the proposing official and deciding official be different persons, and since appellants have shown no specific harm from Beckelman having acted in both capacities, I find no harmful error in this regard.

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Appellant advanced a series of arguments with respect to the seven days accorded them for the purpose of replying to charges in the advance notice. Appellants argued that: the statute, *i.e.*, 5 U.S.C. Section 7513(b) calls for at least thirty days between the advance notice and the effective date of the removal; seven days is the minimum time permissible for an agency to grant; the burden of proof is upon the agency to demonstrate that the time accorded to appellant is reasonable; and, in the instant cases seven days was unreasonable.

The appellants challenged the agency's decision to allow them only seven (7) days in which to respond to their proposed removals, rather than the normal thirty (30) days provided for in 5 U.S.C. Section 7513. The agency explained that it used the shortened notice period exception provided for in the statute for criminal charges, 5 U.S.C. Section 7513(b). The Board will sustain a decision taken after a shortened notice period of at least seven days if the agency shows that when it acted, there was reasonable cause to believe that the employee had committed a crime for which a sentence of imprisonment could be imposed, *see David v. Tennessee Valley Authority*, MSPB Order No. AT07528110206 (May 10, 1982), and *Land v. Federal Aviation Administration*, MSPB Order No. CH07528110154. (July 21, 1982).

The Board has determined that the agency's "reasonable belief" that a crime was committed need not be based on an arrest or police investigation, but can be based on the discovery of "egregious act detrimental to the accomplishment of the agency's mission," *Byrd v. United States Postal Service,* MSPB Order No. NY07528110314 (August 23, 1982) and *Martin v. Department of the Treasury,* MSPB Order No. AT075209044 (June 1, 1982). Further, reasonable cause is commonly defined as "a suspicion founded upon circumstances sufficiently strong to warrant a

reasonable man's belief that the charge is true." Black's Law Dictionary, 1431 (rev. 4th ed. 1968). I find that in light of the appellants' absence without explanation, and the events of August 3-6, 1981, of which the Board has taken official notice, *see Ketchem v. Department of Transportation*, MSPB Order No. DA075281F0713 (May 28, 1982) the agency's belief that appellants had committed a crime was reasonable, *see* 18 U.S.C. Section 1918, and its use of the "crime exception" shortened notice period was proper.

Appellants also raised another issue with respect to the seven days notice. They allege that seven full days are required, the day on which the notice is received being excluded from the computation. The seven full days extend to the last minute of the seventh day, and where the action is effective, the required seven days notice has not been given and the appellant is entitled to relief.

Appellant Neal received his Advance Notice on August 7, 1981 and his letter of decision was issued on August 17, 1981, therefore he was accorded the full seven days to make a reply, and this issue does not pertain to him.

While none of the other appellants appear to have been accorded the full seven days prescribed by statute, I note that all of them did have an opportunity to reply and took advantage of it. None has come forward with any evidence that they would have submitted an additional reply by the date of the decision, and none has demonstrated how the agency's error harmed them or caused the agency to come to a decision different from the one that it did. It is clearly the appellants' burden to show that such an error occurred and that it was indeed harmful, and they must do so by a preponderance of the evidence, *see Pinto v. Department of Labor*, MSPB Order No. DE0752801040 (May 11, 1982). In this case, appellants have not shown how the loss

of one day of their period prejudiced them as they have not argued that they intended to reply to the charges or produce evidence concerning the charges on the 7th day. Further, the Board has concluded that the issuance of a decision letter before the expiration of the 7th day, when the employee has been afforded an opportunity to respond to the charges, is not of itself harmful error warranting reversal of the agency's action, *Johnson v. Department of the Treasury,* MSPB Order No. DC075209213 (August 27, 1982). Accordingly, this argument must be dismissed.

This finding also disposes of appellants' allegation of harmful error with respect to the denial of official time. In the context of an adverse action, official time is time during working hours in which an employee against whom an adverse action is proposed, is, while still being paid by the agency excused from his regular duties, so that he can prepare a reply to the charges against him. The purpose of official time is to give an employee a fair chance to prepare a defense, unhindered by his regular duties, and not having to worry about possible disciplinary action for not having performed his normal assigned work. Since appellants did not present themselves for work, they were engaged in no duties from which they could be excused. In any event, appellants have not shown that they asked for official time and had the request refused, nor have they demonstrated, how the granting of official time would have altered the outcome before the agency.

It was also asserted that the agency violated the law by providing that the appellants' reply could be personally or in writing or both: appellants pointed out that the statute provides for a reply to be made either orally or in writing, or both. They argue that since a personal reply would not necessarily be made orally, e.g., a written reply could be handed over in person, and that an oral reply could be made other than in person, e.g., over

the telephone, they were misled with respect to their procedural rights. The appellants assert that this language effectively ruled out an oral presentation by a representative without the presence of the appellants, or of a telephonic presentation. I note that the advance notices in all of these appeals do permit the appellants to have a representative or an attorney in making a reply, and they do not require the appellants to be present during any reply. Moreover, none of the appellants testified that they had wanted to make a reply telephonically, or through a representative without them being present.

I find that aside from the fact that the appellants' contentions with respect to the matter are purely semantical, they have failed to demonstrate how this use of language in the notice harmed them or caused the agency to reach decisions different from the ones that it would have. Appellants were granted the right to make replies, they did make these replies, and they have not demonstrated how the use of the term "personally" prevented them from making a reply that could possibly have caused the agency to make decisions different from the ones that it did. Accordingly, I find no harmful error in this regard.

The appellants also raised the issue of their duty status during the notice period. Appellants specifically pointed out that the statute and the regulations provide that a separate notice of proposal and decision be made when an individual is to be excluded from the work place during the notice period of an adverse action. In the instant case, the agency made no provision for appellants' status, and given the particular facts of these cases, I find it was unnecessary that it do so. The central issues in these appeals revolve around appellants' absence from the work place, absences which continued throughout the notice period. Appellants argue that the agency, pursuant to President Reagan's orders, would not

have permitted them to return to work. However, there is nothing in the record to show that appellants ever attempted to return to work during this period. The Board has issued a number of decisions on various issues with respect to suspensions, and has consistently reversed decisions wherein employees were unjustifiably suspended during the notice period. *Cuellar v. United States Postal Service*, MSPB Order No. SF075299045 (November 13, 1981); *Poole v. Department of the Army*, MSPB Order No. PH07528010007 (July 30, 1982). Moreover, the Board has reversed agency actions which amounted to a constructive suspension. *Kenny v. Internal Revenue Service*, MSPB Order No. PH07528090154 (January 3, 1982); *Mosely v. Department of the Navy*, 4 MSPB 220 (1980). However, in all of these cases the employee's absence from work was involuntary. In the instant cases, there is reason to believe that appellants failed to be at work on their own volition. Therefore, I find it appropriate to analyze these appeals in terms of the enforced leave cases. In an appeal where there is an allegation that the placement of an employee in an enforced leave status is actually an appealable adverse action, three specific questions must be answered in order to find the appeal within the Board's appellate jurisdiction. As set forth in *Mosely, op. cit.*, these are:

> 1. Was the appellant placed on leave without his consent?
>
> 2. Was the appellant in fact ready, willing, and able to work during the period of leave?
>
> 3. Was the enforced leave used in a personal disciplinary type situation?

Analogizing appellants' absence during the notice period to an

enforced leave situation, I find that appellants have failed to adduce any evidence that their absence from work during this time frame was involuntary, or that they were ready, willing and able to work, or that they attempted to return to work at any time. Accordingly, I find that appellants cannot be considered to have been suspended during the notice period, and I find no harmful error in this regard.

The agency utilized the appellants' Time and Attendance Cards and Personnel Logs to demonstrate the absence of the appellants on the days charged. These documents were kept in the ordinary course of business and even though they are hearsay I find them to be reliable, both because they are regular business documents and because they were supplemented by the direct, sworn testimoy of Thomas Hamill. These documents are found in Tab 11 of the Agency's Submission in each of the appellants' files.

Richard V. Kitts

Richard Kitts was charged with being AWOL and with participating in a strike as of 7:00 p.m. on August 6, 1981. Mr. Hamill, testifying from memory, and utilizing the Time and Attendance Cards and Personnel Logs, stated that appellant was scheduled for the 7:00 a.m. to 3:00 p.m. shift on every day from August 3, 1981 through August 6, 1981, that he did not arrive for work on any of those days, that he was not on approved leave, and that he did not contact the agency to explain his absence. Moreover, appellant was observed picketing on August 5, 1981.

Appellant states that in June 1981 he had indicated that he would not participate in a strike, and that thereafter he was ostracized and harassed to such a degree that by August 3, 1981

he was suffering from acute anxiety. He claims that he was taking prescribed tranquilizers during this period and the combination of drugs and anxiety induced sickness rendered him incapable of handling air traffic. Appellent alleges that he did not call the agency to inform them of his illness because it would have been futile, and that his request for sick leave would have been rejected. Moreover, appellant believed he was fired as of 11:00 a.m. August 5, 1981, and, therefore made no attempt to return to work.

In view of the facts that appellant had never requested sick leave for the days in question, and that no medical evidence was submitted by him, I find that the agency was correct in considering him AWOL based on the information in its possession. *Lucero v. Department of the Air Force*, MSPB Order No. DE07528110117 (October 25, 1982). While appellant may certainly submit medical documentation to excuse or explain his charged absences from work to the Board without first submitting it to the agency, *see Zeiss v. Veterans Administration*, MSPB Order No. NY075209017 (September 1, 1981), and I may determine that this evidence warrants excusal of his absences, *see i.e., Hockman v. American Battle Monuments Commission*, MSPB Order No. SF07528110757 (July 30, 1982), appellant submitted no objective medical evidence at the hearing. Therefore, I find that this assertion does not excuse his absence without leave.

With respect to his allegation that he kept away from work because of harassment and concern about the consequences, I note that even assuming, *arguendo*, that such anxiety would excuse his absence from work, it does not explain his active participation in the strike as evidenced by his having picketed.

Of course, if appellant's actions were involuntary, the charge cannot be sustained, because "one who refused to cross a picket

line by reason of physical fear does not act on principle," and is therefore not considered a striker, *NLRB v. Union Carbide Corp.*, 440 F.2d 54, 56 (4th Cir.), *cert. denied* 404 U.S. 826 (1971). *See also Plain Dealer Publishing Co. v. Cleveland Typographical Union*, 520 F.2d 1220, 1228 (6th Cir. 1975), *cert. denied* 428 U.S. 909 (1978). The Board acknowledged that the question of duress, harassment or intimidation might be an issue in several of these appeals, *see Trick v. Federal Aviation Administration*, MSPB Order No. DC075281F1144 (December 17, 1981), and recently promulgated the standard by which such claims must be analyzed. In *Johnson v. Department of Transportation*, MSPB Order No. DC075281F0998 (November 10, 1982) (hereinafter *Johnson*), the Board concluded that

> [i]n order for a Federal employee charged with participation in a strike against the government to establish defense of coercion or duress, he must demonstrate, by a preponderance of the evidence, that his failure to report for work was the result of a threat or other intimidating conduct, directed toward him, sufficient to instill in him a reasonable fear of physical danger to himself or others which a person of ordinary firmness would not be expected to resist.

Appellant admits there were no physical threats, but testified to a good deal of social ostracism and harassment. However, the Board in *Johnosn*, specifically ruled that such factors are not sufficient cause to render involuntary an employee's participation in an illegal strike.

Some general dicussion of what the agency must prove to meet their evidentiary burden on this charge is appropriate.

Appendix D

Participation in a strike against the government is defined as "an actual refusal in concert with others to provide services to one's employer," *United Federation of Postal Clerks v. Blount*, 325 F. Supp. 879, 884 (D.D.C.), *aff'd.* 404 U.S. 802 (1971). In *Schapansky v. Department of Transportation*, MSPB Order No. DA075281F1130 (October 28, 1982) (hereinafter *Schapansky*), the Board determined that the existence of a strike was common knowledge, and that the agency can establish a *prima facie* case of an employee's voluntary participation therein by presenting evidence of his or her unauthorized absence from duty during the strike. *See also Jones v. Tennessee Valley Authority*, MSPB Order No. AT07528010300 (February 19, 1982) and *Duckett and Yardley v. Tennessee Valley Authority*, MSPB Order No. AT07528010325 (February 19, 1982). In a recent case, the Courts further defined striking against the government as "picketing with co-workers during scheduled work hours," *American Postal Workers Union v. United States Postal Service*, 682 F.2d 1280, 1284 (9th Cir. 1982). In the instant case, the evidence introduced with respect to picketing indicates that the incidents involving appellant were on his duty hours. However, in a long line of cases dealing with whether an individual's action can be deemed to be part of a "concerted activity" under the National Labor Relations Act, the courts have held that an individual employee's actions can be deemed to be part of a concerted activity if they "have some relation to group action in the interest of employees," *Anchortank, Inc. v. NLRB*, 618 F.2d 1153, 1161 (5th Cir. 1980). And, "it is also necessary . . . that the employee's actions themselves at least contemplate some group activity," *Pelton Casteel, Inc. v. NLRB*, 627 F.2d 23, 28 (7th Cir. 1980). The individual's actions must amount to action on behalf of other employees, *Aro, Inc. v. NLRB*, 596 F.2d 713, 717 (6th Cir. 1979) and embody some element of "collected activity," *Krispy Kreme Doughnut Corp. v. NLRB*, 635 F.2d 304, 307 (4th Cir. 1980).

Further, as the Board noted in *Schapansky, supra*, there need not be any overt physical actions by the employee to find that he or she acted in concert with other simiarly situated employees. *See also Hugh H. Wilson Corp.*, 171 NLRB 1040, 1046 (1968).

In the instant case I find that the agency has demonstrated by a preponderance of the evidence that appellant was Absent Without Authorization and that he participated in a strike.

John E. Neal

Appellant Neal was charged with being AWOL and with participating in a strike as of 3:12 p.m. on August 6, 1981. The appellant was on annual leave for August 1 and 2, 1981; on regular days off on August 3 and 4, 1981; was scheduled for the 7:00 a.m. to 3:00 p.m. shift on August 5, 1981; and, was scheduled for the 3:12 p.m. shift on August 6, 1981, his deadline shift. Appellant did not report for duty on either August 5 or 6, 1981, was not on approved leave, and did not contact the agency to explain his absence. Moreover, appellant was observed picketing on either August 3 or 4, 1981.

In the proceedings before the agency appellant alleged that he had been on his regular day off. However, he did not raise the issue before the Board, and I find that he was not on his regular day off on August 6, 1981. In his hearing testimony appellant indicated that he did not return to work because he thought he had already been fired and because of his fears as to what might happen. As analyzed above, it was appellant's obligation to report for work as scheduled in the absence of leave from the agency to be off duty. Appellant's objective impressions of President Reagan's speech did not constitute such leave. Appellant's anxieties with respect to his safety was admittedly

not based on any specific threats, but his own feelings, and I find that these vague fears do not constitute involuntary absence under the *Johnson* standard.

Accordingly, I find that the agency has demonstrated by a preponderance of the evidence that appellant was Absent Without Leave and that he participated in a strike.

The agency moved that I take official notice that there was a nationwide strike by air traffic controllers from August 3, 1981, running through August 6, 1981. The Board has already determined that there exists in the totality of circumstances surrounding the events of August 1981 sufficient information to find that the criteria contained in 5 C.F.R. Section 1201.67 are met, and that official notice may be taken that there was a strike by the Professional Air Traffic Controllers Organization (PATCO) starting on August 3, 1981, and continuing at least through August 6, 1981. However, appellants may present evidence to refute the existence of a strike during this period. *Ketchem v. Department of Transportation,* MSPB Order No. DA075281F0713 (May 28, 1982). Since the appellants did oppose the agency's motion with respect to the issue of official notice, I must examine the respective contentions of the parties bearing on this issue. Appellants focus in on President Reagan's speech of 11:00 a.m. on August 3, 1981:

> This morning at 7:00 a.m. the union representing those who man America's air traffic control facilities called a strike. . . I must tell those who failed to report for duty this morning they are in violation of the law and if they do not report for work within 48 hours they have forfeited their jobs and will be terminated. 17 Weekly Comp. Pres. Doc. 847 (August 3, 1981).

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This statement was followed by one on August 5, 1981 by Secretary of Transportation, Drew Lewis, in which he remarked that as of 11:00 a.m. on that date, the strike was over. Appellants conclude from these statements that not only were they fired as of 11:00 a.m. on August 5, 1981, and the strike was over, but because they were fired and there was no strike, they had no obligation to come to work thereafter, and they cannot be properly charged with either AWOL or striking after that date.

However, I find that there has been no demonstration that the strike ended on August 5, 1981. The crucial question focused upon by the Board and the courts is when had the deadline shift passed for the greater part of the controllers. It was found that as of August 6, 1981 a substantial number of controllers could still have returned to work. I note that in the instant case 5 of the 6 appellants could have returned to work on August 6, 1981 or later.

Whatever the subjective impressions of the instant appellants with respect to the public statements of the Secretary and the President, the fact still remains that they were obligated, both by the nature of the employer-employee relationship and by statute, to report to work.

Richard C. Newman

Appellant Newman was charged with being AWOL and with participating in a strike as of 3:12 p.m. on August 3, 1981. Hamill gave evidence that appellant was scheduled for the 3:12 p.m. to 11:12 shift on August 3, 1981, and for the 2:48 p.m. to 10:48 p.m. shifts on both August 4 and 5, 1981; and, that appellant did not arrive for work on any of these days, that he was not on approved leave, and that he did not contact the agency to

explain his absence. Moreover, appellant was observed picketing on August 5, 1981. With respect to this latter point, appellant's representative complained that the agency was attempting to foist a forgery on the Board. Hamill had based his testimony that appellant was picketing on a list that he had made up after he, and the Chief at the Tower, Robert Beckelman, had observed mass picketing on August 5, 1981. There were two sets of initials on this document, Hamill's and Beckelman's, and they appeared to have been written by two different hands. At the instant hearing Hamill testified that he had subscribed both sets of initials in order to indicate that both he and Beckelman agreed that the names checked on the list had been observed picketing. Appellant's representative claimed that Hamill had testified at earlier hearings involving George Walker and Francis Turek that Beckelman had prepared the documents. A review of the transcripts of those hearings does not indicate any such representation by Hamill, but, at most, a contention that they went over the list together. In all the hearings Hamill consistently indicated that he carried on the clerical function. Moreover, while the initials appear to have been made with a different hand, I find it unlikely that Hamill was trying to emulate Beckelman's signature, since Mr. Beckelman's handwriting is ornate while Hamill's is unadorned. I find that there is no indication that Hamill forged these documents or that his testimony on the August 5, 1981 picketing was unreliable.

Appellant admitted his absences and awareness of the strike. He testified that he did not go to work principally because he feared reprisals such as obscene phone calls; however, he admitted that he had no anxieties over a physical attack. Appellant stated that another reason he stayed out was because he did not want to endanger some of the social relationships which his wife felt

to be important. Appellant denies he was acting in concert with the other controllers.

However, as noted above in *Kitts*, the essence of concerted activity is that an individual's actions must amount to action on behalf of other employees.

Appellant's actions meet all of these criteria. The object of any strike by employees is to put pressure on their employer to meet their terms by denying to the employer their services. On August 3, 1981, PATCO attempted to pressure the Department of Transportation into acceding to the terms proposed for a negotiated agreement by PATCO. The strategy of PATCO was to have its members absent themselves from work and thereby render the Federal Aviation Administration incapable of accomplishing its chartered mission: to insure the safe and efficient flow of air traffic. Appellant chose not only to absent himself from work at a time contemporaneous with the other air traffic controllers, but also to picket the agency in the company of fellow union members. He thereby materially aided PATCO's objectives of denying the services of controllers to the agency and of demonstrating the union's solidarity.

In the instant case I find that the agency has demonstrated by a preponderance of the evidence that appellant was Absent Without Authorization and that he participated in a strike.

Robert L. Kapp

Robert L. Kapp was charged with being AWOL and with participating in a strike as of 3:12 p.m. on August 6, 1981. The appellant had regularly scheduled days off on August 3 and 4, 1981; was scheduled for a 6:50 a.m. to 2:50 p.m. shift on August

5, 1981, and a 2:48 p.m. to 10:48 p.m. shift on August 6, 1981, this last being his deadline shift. As with a number of other appellants, Kapp alleged harmful error because of non-receipt of the Advance Notice in the Letter of Decision, or both. As with Robinson, he alleged harmful error in that the advance notice misstated the time of the shift that he was due in. These contentions will be analyzed below in the general section.

Appellant alleged that he was sick and nervous at the time of the strike and was not in any condition to work. He points out that he was sick earlier in July, had called in, and had been granted sick leave. Aside from his testimony, the only evidence that appellant offered was a letter dated September 7, 1982 from Paul C. Vitt, D.O., who stated that appellant complainted of vague, somatic symptoms characteristic of anxiety neurosis and depression, and that the doctor recommended he take a leave of absence. Aside from the fact that the letter was composed a year after the event, the most salient characteristics of this document is that appellant's complaints are wholly subjective; that Dr. Vitt is an osteopath with no apparent background in psychiatry or psychology; and, that the letter does not state that appellant was disabled for work.

Moreover, appellant did not allege illness as an excuse during the agency process to remove him, and while he claims to have attempted to call in, he made no effort to try to reach another number of which he was aware, when the primary number proved busy. This lack of effort was in the face of the knowledge that there was a strike on and that he might be considered a striker if he did not properly request leave. That appellant was aware of the correct method of obtaining leave is obvious from his successful efforts in this regard during July.

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When questioned about why he had not brought this defense up in his appeal to the Board, appellant stated that at that time he had been advised that coercion was a better defense. I must view appellant's admission in this regard as reflecting on the *bona fides* of his claim of illness.

Accordingly, I find that appellant's claim of illness, in view of both the quality of the evidence used to support it, and the belated manner in which the issue was raised, does not excuse his absence. Accordingly, I find the agency to have demonstrated by a preponderance of the evidence that appellant participated in a strike and was absent without authorization.

John W. Clarke

John W. Clarke was charged with being AWOL and with participating in a strike as of 7:00 a.m. on August 8, 1981. Appellant was on the midnight shift on August 3, 1981, i.e., 11:00 p.m., August 2, 1981 to 7:00 a.m., August 3, 1981. He also was scheduled for midnight shifts on August 4 and 5, 1981, with regularly scheduled days off on August 6 and 7, 1981. His 7:00 a.m. shift on August 8, 1981 was his deadline shift.

Appellant alleges he was sick throughout this period and presented some evidence to that effect.

His first exhibit concerned rectal bleeding from which he suffered in 1979. Appellant claims he suffered from the same symptoms at the time of the strike. However, he offered no objective evidence to support that contention. He presented evidence that he was diagnosed as having suffered from anxiety depression on August 4, 1981, and had been prescribed a

tranquilizer. Subsequently, at the end of the month he had been prescribed even stronger tranquilizers.

Appellant alleges that when he left on August 3, 1981 he had told his supervisor, that he was sick. While the evidence of record supports that he made that contact with his supervisor, I note that the leave was disapproved. Appellant and three other members of the midnight shift, when ordered to remain on duty because of understaffing, refused, all claiming to be ill. Since this event occurred concurrent with the onset of the strike, the agency had reasonable grounds to doubt appellant's claim. Moreover, appellant did not call in to report sick for any shifts that week until August 8, 1981, and, in the meantime, had been observed picketing. Even then, it was his wife who called in. While documentary evidence has been submitted to indicate that a call was made to Philadelphia International Tower, there was no evidence that leave had been approved. While appellant did raise the defense of sickness during the agency proceeding against him, he did not then adduce any of the evidence presented at the hearing. Accordingly, I find that appellant was in an Unauthorized Absence status as of August 8, 1981.

However, while some of appellant's actions are indicative of strike support, I only took official notice of the existence of a strike through August 6, 1981, and the agency presented no evidence that it continued beyond that point. Accordingly, I find that the agency has not proven that appellant engaged in a strike.

Thomas D. Robinson

Thomas D. Robinson was charged with being AWOL and with participating in a strike as of 3:00 p.m. on August 6, 1981. The appellant was on regularly scheduled days off on August 3

and 4, 1981; was scheduled for the 7:00 a.m. to 3 p.m. shift on August 5, 1981, and was scheduled for the 2:48 p.m. to 10:48 p.m. shift on August 6, 1981. Appellant alleges that because the advance notice misstates the time of the shift tha he was due in, harmful error was committed. This contention will be analyzed in the general section below.

Appellant admits his absences but alleges that he was sick with the flu on August 4 and 5, 1981; that he tried to contact the agency, but failed because the line was busy; that he heard that he had been fired and thereafter believed it was futile to attempt to go in.

I find appellant's explanation of his absences to be disingenuous. Appellant did not raise the issue of his alleged illness either in the agency proceedings or in his initial appeal before the Board. Moreover, at the hearing he presented no objective medical evidence to substantiate his claim of illness. Furthermore, I find it incredible, assuming *arguendo,* that he was really sick, that he would not make more vigorous attempts to inform the agency, at least to the extent of finding another telephone number that he could call. It is equally unfathomable that any individual, haveing a purportedly good excuse for his absence, would assume that the agency would not accept his reason without at least trying to bring his explanation before the agency.

Accordingly, I find that the agency has demonstrated by a preponderance of the evidence that appellant was Absent without Leave and that he participated in a strike.

The appellants who raised a sickness defense contend that they had no obligation to come to work when they were incapable of controlling traffic, that the agency had no need of their services.

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However, there was testimony that the agency could have utilized them in non-controller positions, and I find that it is well within the managerial prerogative of an agency to determine to what tasks an employee shall be assigned, and the appellants who absented themselves, deprived the agency of that prerogative.

Some appellants alleged they did not receive their advance notice, and some assert that they did not receive their notice of decision. However, I note that all appellants did make replies to the charges in the advance notices, and all did file timely appeals to the Board. Therefore, I find no harmful error in regard to these allegations.

Some of the appellants were charged with being AWOL and on strike at times other than they actually were. It is argued that this is harmful error because the appellants were not informed of the charges against them. However, I note that the errors involved only a few minutes. Kapp was charged with being AWOL from the 3:12 p.m. shift on August 6, 1981 whereas he was actually scheduled for the 2:48 p.m. shift on that day. Robinson was charged with being absent from the 3:00 p.m. shift whereas he actually was scheduled for the 2:48 p.m. schedule on that day. This error did the appellants no factual harm since neither alleged they attempted to show up at any time on August 6, 1981. I find that it did no procedural harm since the shifts they were charged with missing and the shifts they actually missed are permutations of the basic 3:00 p.m. to 11:00 p.m. shift which they actually missed.

The essential function of a notice of adverse action is to adequately inform the employee of the basis of the proposed action with sufficient particularity to apprise him of allegations he must refute or acts he must justify. *Burkett v. United States,* 402 F.2d

1002 (Ct. Cl. 1968); *Englehardt v. United States,* 125 Ct. Cl. 603, 606 (Ct. Cl. 1953); *Hendricks v. Department of the Interior,* MSPB Order No. SF07528090167 (February 23, 1982); *Johnson v. Department of the Air Force,* MSPB Order NO. DA07528110347 (April 23, 1982). The two specifications against appellants were essentially that they had been on strike and in an Unauthorized Absence status beginning 3:00 p.m. August 6, 1981 to the present. Since the evidence is clear that appellants had not been at work for any of their shifts scheduled after August 2, 1981, I find that they had sufficient notice of the charges against them to be able to dispute them.

With respect tot he penalty meted out, it is well established that Unauthorized Absence from duty constitutes proper grounds for removal since, by its very nature, it disrupts the efficiency of the service. *Bolling v. Department of the Air Force,* MSPB Order No. NY07528090034 (December 28, 1982); *Desiderio v. Department of the Navy,* 4 MSPB 171 (1980). However, the agency based its removal action principally upon the fact that appellant participated in a strike. I find that removal for such an offense is particularly justified since it is Unauthorized Absence in concert with others, the effect of which was to disrupt the agency in its mission of controlling air traffic throughout the United States. In *United States v. Restor, et al.,* Crim. No. 81-187, Slip. Op. at 8-9, (W.D. Pa. January 13, 1981) Judge Diamond took official notice that the strike by the air traffic controllers resulted in hardship and inconvenience to the public, increased unemployment of innocent people and a loss of millions of dollars in the airline industry, further stating that the controllers' conduct was "uniquely anti-social". I note that the Board in *Schapansky* found that the penalty of removal was appropriate for an air traffic controller who had struck because the offense impacted directly on airline safety. In sum, I find that a strike against the police

powers of the government, i.e., the law enforcement and public health and safety functions, particularly in defiance of a prohibiting statute, is so serious a trangression of the employer-employee relationship, that no penalty other than removal would be appropriate.

In *Schapansky, supra,* at 11-12, the Board noted that 5 U.S.C. Section 7311(3) seems to mandate removal as a penalty for federal employees who have participated in a strike against the federal government, a conclusion buttressed by the decision of the Ninth Circuit in *American Postal Workers Union v. United States Postal Service,* 682 F.2d 1280 (9th Cir. 1982). The ruling in *Schapansky* is consistent with the Board's decisions in other appeals involving statutorily mandated minimum penalties for specified offenses, i.e., misuse of government vehicles and Hatch Act violations. In *Woody v. General Services Administration,* MSPB Order No. SF07528110028 (June 2, 1981), the Board held that since 31 U.S.C. Section 638a(c)(2) requires that a government employee who is found to have misused a government vehicle be suspended for not less than a month, an agency cannot choose a lesser penalty. In *Special Counsel v. Dukes,* MSPB Order No. HQ12060020 (October 29, 1981), the Board would not approve a settlement agreement that would have imposed a lesser penalty than the statutory minimum prescribed by 5 U.S.C. Section 7324.

Therefore, having found that appellants Robinson, Kapp, Kitts and Newman participated in a strike, I find that removal is an appropriate penalty.

With respect to appellant Clarke, although I have found that the agency has not sustained the charge of striking against him, nonetheless, I note that the agency demonstrated that his absences in the latter part of the week of August 3, 1981 continued a pattern of AWOL begun during the period of the strike. Hamill testified

without rebuttal as to the deleterious effect the absences of the appellants had on agency operations, particularly with respect to airline operations effecting the general public. Under these circumstances, I find that the agency was justified in imposing the removal penalty with respect to Clarke as well as the appellants found to have participated in the strike and been AWOL.

DECISION

The agency's decision to remove Robert Kapp is sustained.

The agency's decision to remove Thomas Robinson is sustained.

The agency's decision to remove John Neal is sustained.

The agency's decision to remove Richard Newman is sustained.

The agency's decision to remove Richard Kitts is sustained.

The agency's decision to remove John Clarke is sustained.

NOTICE

This decision is an initial decision and will become a final decision of the Merit Systems Protection Board on March 7, 1983, unless a petition for review is filed with the Board or the Board reopens the case on its own motion.

Any party to this appeal, the Director of the Office of Personnel Management, or the Special Counsel may file a petition for review of this decision with the Merit Systems Protection

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Board. The petition for review must set forth specific objections to the initial decision, supported by references to applicable laws or regulation, and with specific reference to the record. The petition for review must be filed with the Secretary to the Merit Systems Protection Board, Washington, D.C. 20419 no later than the date set forth above.

After providing an opportunity for response by other parties, the Board may grant a petition for review when it is established that:

(1) New and material evidence is available that, despite due diligence, was not available when the record was closed; or

(2) The decision of the Presiding Official is based on an erroneous interpretation of statute or regulation.

APPENDIX E — TEXT OF PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Fifth Amendment

> "No person . . . shall be deprived of life, liberty or property, without due process of law . . . ."

Sixth Amendment

> "In all criminal prosecutions the accused shall enjoy the rights . . . to be confronted with the witnesses against him . . . ."

STATUTES

5 U.S.C. § 7513. Cause and procedure

> (a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.
>
> (b) An employee against whom an action is proposed in entitled to—
>
> > (1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date.

* * *

(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title . . . .

(e) Copies of the notice of proposed action, the answer of the employee when written, a summary therefor when made orally, the notice of decision and reasons thereof, and any order effecting an action covered by this subchapter together with any supporting material, shall be maintained by the agency and shall be furnished to the Board upon its request and to the employee affected upon the employee's request.

5 U.S.C. § 7701. Appellate procedures.

(a) An employee, or applicant for employment, may submit an appeal to the Merit

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Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right—

(1) to a hearing for which a transcript will be kept; and

(2) to be represented by an attonrey or other representative.

Appeals shall be processed in accordance with regulations prescribed by the Board.

(b) . . . in any case involving a removal from the service, the case shall be heard by the Board, an employee experienced in hearing appeals, or an administrative law judge . . . .

(c)(1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision—

* * *

(B) . . . is supported by a preponderance of the evidence.

(2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment—

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(A) shows harmful error in the application of the agency's procedures in arriving at such decision;

(B) shows that the decision was based on any prohibited personnel practice described in section 2302 (b) of this title; or

(C) shows that the decision was not in accordance with law.

5 U.S.C. §7703. Judicial review of decisions of the Merit Systems Protection Board

(a)(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

* * *

(b)(1) Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review must be filed within 30 days after the date the petitioner received notice of the final order or decision of the Board.

* * *

(c) In any case filed in the Court of Appeals

for the Federal Circuit, the Court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be—

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence . . . .

* * *

REGULATIONS

OFFICE OF PERSONNEL MANAGEMENT REGULATIONS ISSUED PURSUANT TO 5 U.S.C. § 7513(a)

5 C.F.R. § 752.404. Procedures

(a) *Statutory entitlements.* An employee against whom action is proposed under this subpart is entitled to the procedures provided in 5 U.S.C. 7513(b).

(b) *Notice of proposed action.* (1) The notice of proposal shall inform the employee of his or her right to review the material which is relied on to support the reasons for action given in the

notice. The agency may not use material which cannot be disclosed to the employee or his or her representative or designated physician under § 297.108(c)(1) of Part 297 of this title to support the reasons in the notice.

* * *

(c) *Employee's answer.* (1) The agency shall give the employee a reasonable amount of official time to review the material relied on to support its proposal and to prepare an answer and to secure affidavits, if he or she is otherwise in an active duty status.

(2) The agency shall designate an official to hear the employee's oral answer who has authority either to make or recommend a final decision on the proposed adverse action . . . .

(d) *Exceptions.* (1) 5 U.S.C. 7513(b) authorizes an exception to the 30 days' advance written notice when the crime provision is invoked. The agency may require the employee to furnish any answer to the proposed action, and affidavits and other documentary evidence in support of the answer within such time as under the circumstances would be reasonable, but not less than seven days. When the circumstances require immediate action, the agency may place the employee in a nonduty status with pay for such time, not to exceed ten days, as is necessary to effect the action.

(2) The advance written notice and opportunity to answer are not necessary for furlough without pay due to unforeseeable circumstances, such as sudden breakdowns in equipment, acts of God, or sudden emergencies requiring immediate curtailment of activities.

* * *

(e) *Representation.* 5 U.S.C. 7513(b)(3) provides that an employee covered by this part is entitled to be represented by an attorney or other representative . . . .

(f) *Agency decision.* In arriving at its written decision, the agency shall consider only the reasons specified in the notice of proposed action and shall consider any answer of the employee and/or his or her representative made to a designated official. The agency shall deliver the notice of decision to the employee at or before the time the action will be effective. The notice shall tell the employee of his or her appeal rights.

* * *

OTHER REGULATIONS ISSUED BY OFFICE OF PERSONNEL MANAGEMENT

5 C.F.R. § 630.401 Grant of sick leave.

An agency shall grant sick leave to an employee when the employee:

* * *

(b) Is incapacitated for the performance of duties by sickness, injury, or pregnancy and confinement;. . . .

5 C.F.R. §630.403 Supporting evidence.

An agency may grant sick leave only when suported by evidence administratively acceptable. Regardless of the duration of the absence, an agency may consider an employee's certification as to the reason for his absence as evidence administratively acceptable. However, for an absence in excess of 3 workdays, or for a lesser period when determined necessary by an agency, the agency may also require a medical certificate, or other administratively acceptable evidence as to the reason for the absence.

MERIT SYSTEMS PROTECTION BOARD REGULATIONS

5 C.F.R. §1201.33

Every Federal agency shall make its employees available to furnish sworn statements or to appear as witnesses at the hearing when requested by the presiding official. When providing such statements or testimony, witnesses shall be in official duty status.

5 C.F.R. §1201.56 Burden and degree of proof, affirmative defenses.

(a) *Burden and degree of proof.* (1) Agency:

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Under 5 U.S.C. 7701(c)(1) the agency action must be sustained by the Board if:

* * *

(ii) . . . is supported by a preponderance of the evidence.

* * *

(b) *Affirmative defenses of the appellant.* Under 5 U.S.C. 7701(c)(2), the Board is required to overturn the action of the agency even where the agency has met the evidentiary standard set forth is subsection (a), above, in any case where the appellant:

(1) Shows harmful error in the application of the agency's procedures in arriving at such decision;

(2) Demonstrates that the decision was based on any prohibited personnel practice described in 5 U.S.C. 2302(b); or

(3) Shows that the decision was not in accordance with law.

(c) *Definitions.* For purposes of this section, the following definitions shall apply:

* * *

(2) Preponderance of the evidence: That degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

(3) Harmful error: Error by the agency in the application of its procedures which, in the absence or cure of the error, might have caused the agency to reach. The burden is upon the record as a whole the error was harmful, i.e., cased substantial harm or prejudice to his/her rights.

(d) *Moving forward.* In cases where action has been taken against an employee by the agency, the agency shall present its case first. The appellant may then present evidence.

5 C.F.R. §1201.72. Explanation and scope.

(a) Explanation: Discovery is the process apart from the hearing whereby a party may obtain relevant information from another person. Including a party, which has not otherwise been provided. Relevant information means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. This information is obtained for the purpose of assisting the parties in developing, preparing, and presenting their

cases. The Federal Rules of Civil Procedure may be used as a general guide for discovery practices in proceedings before the Board where appropriate except as to matters specifically covered by these regulations. The federal rules shall be interpreted as instructive rather than controlling in any event.

* * *

RULES OF APPELLATE PROCEDURE

Rule 38. Damages for Delay

If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

RULES OF CIVIL PROCEDURE

Rule 11. Signing of Pleadings, Motions, and Other Papers; Sanctions

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated . . . . The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or

reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initative, shall impose upon the person who signed it, a represented party, or both, an approriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Rule 37. Failure to Make or Cooperate in Discovery: Sanctions

* * *

(b) Failure to comply with order.

* * *

(2) Sanctions by court in which action is pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f) the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

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(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purpose of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defense, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring his to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

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In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

* * *

APPENDIX F—EXCERPT FROM PETITIONER'S BRIEF TO UNITED STATES COURT OF APPEALS

SUMMARY OF ARGUMENT

1. Petitioners were denied due process. In order to prevent the deposition of the Deputy Tower Chief, Hamill, the agency had wilfully lied to the Presiding Official that Hamill had no information relevant to the matter before the Board. At the hearing the agency offered Hamill as its sole witness who knew everything. This false statement constituted a violation of 18 U.S.C. 1001 relative to false statements and 18 U.S.C. 1505 relative to obstruction of justice.

Despite this the Presiding Official denied Petitioners motion to prevent his testimony and to impose sanctions granting the appeals, Hamill was permitted, over Petitioners objection to testify as to anything and everything including the remotest hearsay. The agency did not and was not required by the Presiding Official to call any employee who had personal knowledge.

In April 1982 the Presiding Official had directed the deposition of the Tower Chief Beckelman by May 31, 1982. When the agency failed to produce Beckelman Petitioners moved for sanctions on June 4, 1982 granting the appeal. Despite the fact that the agency did not oppose the motion the Presiding Official did not advise Petitioners' attorney until September 20, 1982, the day before the hearing, that he would not grant the motion for sanctions.

The Presiding Official was biased against Petitioners and so conducted himself as to favor and defend the agency and deny Petitioners a fair hearing. Misconduct on the part of the agency is rationalized or ignored. The fact of the Agency's burden of proof is overlooked. Petitioners are burdened by a special standard

of proof--evidence must be "objective". No testimony by Petitioners is to be believed. Documents submitted by Petitioners also do not meet the Presiding Official's standard of proof. On the other hand, with respect to the Agency the Presiding Official condones false statements, forgery, concocted documents and the failure to call knowledgeable witnesses and accepts the remotest hearsay.

2. The deciding official lacked authority to dismiss the Petitioners.

The Petitioners submitted documentary evidence that the Tower Chief lacked authority to act and the Agency failed to rebut this document. Accordingly the actions were unauthorized and invalid. This applies to all Petitioners. In addition the Petitioner submitted deposition testimony of a Regional representative to prove that there was no authority to dismiss anybody on a specification of August 3, 4 or before 11:00 a.m. of August 5, 1981. Since Newman was dismissed with a specification of August 3, 1981 the action was improper and Newman should be reinstated for that reason too.

3. Petitioners Robinson, Newman and Kapp received no notice of intent to remove. Failing such notice they are entitled to relief.

4. Petitioners were not on strike. At the tower in question, the Philadelphia Tower, the strike ended 11:00 a.m. August 5, 1981. All except Newman were charged with striking August 6, 1981. Since there was no strike in progress at that time they are entitled to relief.

5. Petitioners Kapp and Robinson were dismissed for a reason

other than alleged in the notice of intent. They were discharged for failing to appear at a shift at which they were not scheduled to appear and are therefore entitled to relief.

6. The dismissals of Kitts and Neal were not effective inasmuch as the notice of dismissal was not received before the effective date of removal as required by regulations.

Supreme Court, U.S.
FILED
FEB 14 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-951

In the Supreme Court of the United States

OCTOBER TERM, 1985

THOMAS D. ROBINSON, ET AL., PETITIONERS

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly affirmed the decision of the Merit Systems Protection Board sustaining petitioners' removal for participating in a strike against the United States and for being absent without leave.

2. Whether the court of appeals abused its discretion in assessing $500 against petitioners' counsel under Fed. R. App. P. 38.

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OCTOBER TERM, 1985

No. 85-951

THOMAS D. ROBINSON, ET AL., PETITIONERS

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-5a) is reported at 769 F.2d 1556. The opinion of the Merit Systems Protection Board (Pet. App. 6a-9a) is reported at 16 M.S.P.R. 264; the opinion of the Board's presiding official (Pet. App. 10a-40a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 1985. Petitioners' petition for rehearing was denied on September 9, 1985 (Pet. App. 1a). The petition for a writ of certiorari was filed on December 3, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners challenge their removal from federal employment following the air traffic controllers' strike in 1981. The background of the strike and the subsequent litigation are set forth in our Brief in Opposition in *Campbell* v. *Department of Transportation, FAA*, No. 84-78, in response to one of a number of other petitions arising out of the strike.[1]

1. Petitioners were removed from their positions as air traffic controllers on the grounds that they participated in a strike against the United States and were absent without leave during the strike. They appealed to the Merit Systems Protection Board (MSPB or Board), where they were afforded a hearing. The agency established a prima facie case of strike participation by demonstrating that petitioners were absent without leave during a strike of general knowledge.[2] At no time did petitioners claim that they reported to work on the days charged or that their absences were authorized. The presiding official re-

---

[1] A copy of our response in *Campbell* has been sent to counsel for petitioners.

[2] The standard applied requires that the agency at all times bear the burden of persuasion with respect to strike participation; the agency must show by a preponderance of the evidence that the employee withheld his services in concert with others. *Schapansky* v. *Department of Transportation, FAA*, 735 F.2d 477, 482-483 (Fed. Cir.), cert. denied, No. 84-258 (Nov. 13, 1984). Once the agency has made a prima facie showing by evidence of the employee's unauthorized and unexplained absence during a strike of general knowledge, "the burden of going forward with evidence to rebut that showing necessarily shifts to the employee, who is in the best position to present explanatory evidence to counter that showing." 735 F.2d at 482. See Pet. App. 3a.

viewed petitioners' myriad claims in some detail (Pet. App. 10a-40a) and rejected them. He found that the agency had proved the charges against petitioners of strike participation and absence without leave by a preponderance of the evidence, and that removal was an appropriate penalty. The full Board denied petitioners' petition for review, also discussing and rejecting petitioners' numerous contentions (*id.* at 6a-9a).

Petitioners then sought review in the United States Court of Appeals for the Federal Circuit. Their petition was among approximately 3,500 similar petitions filed by discharged air traffic controllers. All but nine cases were stayed pending the court's decisions in those "lead cases." On May 18, 1984, a five-judge panel of the court of appeals issued 11 decisions sustaining the removals of all but one of the petitioners in the lead cases.

A number of the unsuccessful petitioners filed petitions for a writ of certiorari; all were denied. See, *e.g.*, *Schapansky* v. *Department of Transportation, FAA*, 735 F.2d 477 (Fed. Cir.), cert. denied, No. 84-258 (Nov. 13, 1984); *Anderson* v. *Department of Transportation, FAA*, 735 F.2d 537 (Fed. Cir.), cert. denied, No. 84-259 (Nov. 13, 1984); *Campbell* v. *Department of Transportation, FAA*, 735 F.2d 497 (Fed. Cir.), cert. denied, No. 84-78 (Oct. 9, 1984). After this Court denied the petitions in the lead cases, the court of appeals lifted the stay of the other pending appeals.

2. In one of the first decisions issued by the court of appeals after the stay was lifted, the court affirmed the decision of the Board in petitioners' case (Pet. App. 2a-5a). The court noted (*id.* at 3a) that "[c]ounsel bases this entire appeal on an unfounded attack on the government," and that the challenge to

the Board's decision amounted to an "indiscriminate 'blast of procedural objections' substantially identical to that condemned in *DiMasso v. Department of Transportation, FAA*, 735 F.2d 526, 527 n.3, 528 (Fed. Cir.), *cert. denied*, [No. 84-258 (Nov. 13, 1984)], an authority blithely disregarded by counsel." The court "carefully reviewed petitioners' arguments and the record 'on the possibility that a non-frivolous contention might have been found lurking' " but concluded that "[t]his appeal is clearly frivolous" (Pet. App. 4a-5a (citations omitted)). The court found that the Board's decision was not arbitrary or capricious, procedurally unsound, or unsupported by substantial evidence (*id.* at 5a; see 5 U.S.C. 7703(c)), and assessed $500 against petitioners' counsel under Fed. R. App. P. 38 (Pet. App. 5a).

ARGUMENT

Petitioners raise only frivolous procedural objections to their discharges, and do not dispute that they were not at work during the strike and that their absence was unauthorized. The $500 assessment against their counsel was also amply justified. The decision of the court of appeals in this factbound dispute is therefore correct and does not merit further review.

1. Petitioners' challenge to the merits of the decision of the court of appeals is clearly unavailing. Their principal claim on appeal was that they had been denied due process by the agency's failure to produce a witness, by its erroneous initial statement that another witness petitioners sought to depose had no relevant information, by the presiding official's failure to impose sanctions on the agency, by his allowance of the second witness's testimony, and by his general

bias in favor of the agency (Pet. App. 3a-4a, 55a-56a). It is unclear whether this claim is included in the petition. In any event, for the reasons given by the court of appeals (*id.* at 3a-4a), the claim is patently without merit.

Petitioners' remaining contentions on appeal—which are renewed in their petition for a writ of certiorari—were properly rejected on the basis of the Board opinion (Pet. App. 5a; see 5 U.S.C. 7703(c)). We shall discuss them briefly here.

a. Petitioners' contention (Pet. 19-20) that the agency official who removed petitioners acted without authority was rejected by the Board because the agency directive upon which petitioners relied had been superseded and because unrebutted testimony established that the authority to remove petitioners had been delegated to the agency official (Pet. App. 7a). Petitioners have not demonstrated any error in this holding.[3]

b. Petitioners' contention (Pet. 20-23) that the agency failed to give them proper notice of the proposal to remove them is essentially a challenge to the harmful error rule applied by the court of appeals in the lead air traffic controller case of *Adams* v. *Department of Transportation, FAA*, 735 F.2d 488, 490 n.3 (Fed. Cir.), cert. denied, No. 84-258 (Nov. 13, 1984). See also Pet. App. 15a-16a; *Handy* v. *United States Postal Service*, 754 F.2d 335 (Fed. Cir. 1985). The presiding official found that petitioners all had "an opportunity to reply and took advantage of it" and that "[n]one has come forward with any evidence that they would have submitted an additional

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[3] Petitioners' contention (Pet. 19-20) that there was no strike at the time in question is answered at pages 6-7, *infra*.

reply by the date of decision, and none has demonstrated how the agency's error harmed them or caused the agency to come to a decision different from the one that it did" (Pet. App. 19a). Petitioners suggest no reason why this Court should review the harmless error standard after declining to do so in *Adams*, nor do they suggest why the error was not harmless.

c. Petitioners' contention (Pet. 23-25) that there was no air traffic controller strike at the time they were charged with strike participation was properly rejected based on the opinions of the Board (see Pet. App. 5a, 8a-9a n.2, 28a-29a).[4] Petitioners appealed this question notwithstanding the court of appeals' prior decision in *Adams* v. *Department of Transportation, FAA*, *supra*, that the strike began on August 3, 1981, that it continued until some event ended it,[5] and that the statements of government officials upon which petitioners rely did not end the strike. 735 F.2d at 493-494. Petitioners' attempt to

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[4] The presiding official quite reasonably granted the agency's request that he take official notice that a nationwide strike by air traffic controllers began on August 3, 1981, and continued through at least August 6, 1981, a time period that encompassed the dates on which petitioners were charged with strike participation. In doing so, the presiding official followed a prior decision of the full Board to the same effect (*Ketchem* v. *Department of Transportation, FAA*, 12 M.S.P.R. 1, 7 (1982)). The presiding official then rejected the claim that statements by government officials on or prior to August 5 somehow ended the strike, concluding that petitioners were still required to return to work after that date. Pet. App. 28a-29a. The fact that petitioners continued to withhold their services itself evidenced a continuation of the strike.

[5] In *Adams*, the court of appeals concluded that there was no evidence that the union took any steps to end the strike before August 12, 1981. 735 F.2d at 493.

rehash the issues decided in *Adams* does not merit this Court's review.

d. Petitioners Kapp and Robinson's contention (Pet. 25-26) that their discharges should be cancelled because they were removed for reasons other than those stated in the notices of proposed removal is also frivolous. The only errors in the notices for those individuals were de minimis discrepancies in the time of the shift to which they failed to report on August 6 (Pet. App. 36a).[6] The presiding official properly found that no harm resulted from this error; neither individual alleged that he attempted to report for work at any time on that day (*ibid.*). In *Campbell* v. *Department of Transportation, FAA*, 735 F.2d 497, 502 (Fed. Cir.), cert. denied, No. 84-78 (Oct. 9, 1984), the court of appeals specifically rejected the sort of argument petitioners Kapp and Robinson continue to pursue here.

e. Petitioners Kitts and Neal's contention (Pet. 26) that their discharges should be cancelled because they did not receive notice of the agency's decision to remove them on or before the effective date of the removal is meritless. While 5 C.F.R. 752.404(f) does require notice on or before the effective date of a removal, there has been no demonstration of harm in this case. The only potential harm would be an untimely appeal to the Board, but in this case both petitioners filed timely appeals. As the Board said,

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[6] Petitioner Kapp was charged with being AWOL from the 3:12 p.m. shift on August 6, 1981, when the shift to which he failed to report actually began 24 minutes earlier, at 2:48 p.m. Petitioner Robinson was charged with being AWOL from the 3:00 p.m. shift on August 6, when his shift on that date was actually scheduled to begin at 2:48 p.m., 12 minutes earlier. Pet. App. 36a.

"[A]ll of the [petitioners] * * * timely filed appeals with the Board. Thus, the presiding official correctly found that [petitioners] failed to establish that these alleged procedural errors were harmful" (Pet. App. 7a-8a; see *id.* at 36a). Absent a demonstration of harm, petitioners' late receipt of the notices of removal cannot justify cancellation of their removals.

f. Petitioners' contention (Pet. 27-28) that the Board applied an improper rule of evidence is, in fact, a repetition of their contention to the court below that the Board's presiding official was biased. The court of appeals found this argument to be "[w]ithout the slightest justification," "utterly meritless raillery," and "offensive" (Pet. App. 4a). Nothing in petitioners' present petition demonstrates that this finding should be reviewed by this Court.[7]

2. The court of appeals was also entirely justified under Fed. R. App. P. 38 in assessing $500 against petitioners' counsel (Pet. App. 5a).[8] As the foregoing discussion demonstrates, the court of appeals had ample reason to conclude that petitioners' appeal was "clearly frivolous"—that petitioner's arguments lacked "the slightest justification"; were "utterly meritless raillery" and "offensive"; had "waste[d]

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[7] Petitioners' specific claims (Pet. 27-28) of sickness were correctly discarded by the presiding official (see Pet. App. 24a, 32a, 35a) and do not merit further review.

[8] Rule 38 provides:

> If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

This Court's similar rule is Rule 49.2, which states:

> When an appeal or petition for writ of certiorari is frivolous, the Court may award the appellee or the respondent appropriate damages.

the resources" of the court and opposing counsel; and had been "destructive to the equitable and efficient administration of justice [by] * * * delay[ing] deserving litigants in obtaining their statutory and constitutional right to judicial review" (*id.* at 4a-5a). Petitioners, however, also challenge the award on the grounds (Pet. 10) that they had no notice or opportunity for a hearing; that Rule 38 does not authorize an award against counsel; that the court of appeals did not adequately explain why the $500 sum levied was "just"; and that there could be no award absent a finding that counsel had acted in bad faith. These contentions are insubstantial.

a. There can be no credible claim in this case that petitioners' counsel was without notice of the court's intention to exercise its Rule 38 powers. He must have been aware of Rule 38. Moreover, the Federal Circuit had published numerous decisions assessing costs and damages upon the filing of frivolous appeals.[9] Indeed, the court of appeals sent all counsel in the air traffic controller appeals, including petitioners' counsel, two separate notices—on May 18, 1984, and December 10, 1984—advising them of the impropriety of maintaining frivolous appeals and citing the court's precedents (listed in the preceding

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[9] See *Wright* v. *United States*, 728 F.2d 1459, 1460 (Fed. Cir. 1984), cert. denied, No. 83-6869 (Oct. 1, 1984); *Beachboard* v. *United States*, 727 F.2d 1092, 1094-1095 (Fed. Cir. 1984); *Connell* v. *Sears, Roebuck & Co.*, 722 F.2d 1542, 1553-1555 (Fed. Cir. 1983); *Asberry* v. *United States Postal Service*, 692 F.2d 1378, 1382 (Fed. Cir. 1982). Decisions by other courts of appeals making similar awards are collected in Annot., *Award of Damages or Costs Under 28 USCS § 1912 or Rule 38 of Federal Rules of Appellate Procedure, Against Appellant Who Brings Frivolous Appeals*, 67 A.L.R. Fed. 319 (1984 & Supp. 1985).

footnote) on the subject. See also *Adams* v. *Department of Transportation, FAA*, 735 F.2d at 494; *Moylan* v. *Department of Transportation, FAA*, 735 F.2d 524, 524 n.* (Fed. Cir.), cert. denied, No. 84-258 (Nov. 13, 1984). Petitioners and their counsel clearly had ample notice of the court's intention to assess costs and damages against them if they pursued frivolous appeals.

Petitioners' claim that they were entitled to a hearing is curious, because they do not explain what purpose a hearing would have served. See *Codd* v. *Velger*, 429 U.S. 624, 627 (1977). "After thorough review of the record, briefs, and submissions" (Pet. App. 3a), and after hearing oral argument, the Federal Circuit concluded that their appeal was frivolous. Petitioners do not point to anything they would present at a hearing that they did not argue on appeal. They recognize that the only issue is whether their appeal was frivolous, and they have already had their notice and hearing on that issue.[10]

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[10] *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752 (1980), does not require that assessments against counsel pursuant to court rules be preceded by notice to counsel and an opportunity for a hearing (see Pet. 10). It was only in connection with the exercise of the courts' inherent powers—not pursuant to a court rule, as in the instant case—that this Court found "fair notice and an opportunity for a hearing on the record" to be required prior to an award of attorney fees. 447 U.S. at 767. As stated in the text, the issuance of court rules clearly provides notice that assessments may be made, and the right to be heard on the matter is afforded by the opportunity to submit a brief reciting the merits of one's case. Under such circumstances, it would be ironic indeed to require that the judiciary afford additional opportunities to burden the courts to a lawyer who has already abused the judicial system in the face of rules that prescribe assessments in response to such conduct. See

b. The contention that the court of appeals had no authority to make an asessment against counsel is also without merit. Rule 38 specifically authorizes an award of damages and single or double costs to the appellee in a frivolous appeal. Similarly, 28 U.S.C. 1912 affords a court of appeals the power to award damages and single or double costs to the prevailing party when it has affirmed the judgment below. Neither provision directs that such an award be made only against the losing party or suggests any impediment to an award against the offending counsel. See also 28 U.S.C. 1927 (empowering any court of the United States to assess excess costs, expenses, and attorney fees against "[a]ny attorney * * * who so multiplies the proceedings in any case unreasonably and vexatiously"). The courts of appeals have not

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Miranda v. *Southern Pacific Transportation Co.*, 710 F.2d 516, 525 (9th Cir. 1983) (Wallace, J., concurring in part and dissenting in part). Moreover, the Court in *Roadway Express* had already concluded in the relevant section (447 U.S. at 764-767), that bad faith was required—the determination of which might also benefit from a hearing. This inquiry is unnecessary in this case (see p. 13, *infra*).

Nor did *Miranda* v. *Southern Pacific Transportation Co.*, *supra*, establish a right to formal notice and a hearing under the circumstances of this case. *Miranda* involved a summary imposition of sanctions on attorneys who failed to comply with local rules. As the court of appeals noted, a hearing would have allowed "the attorneys to respond with any arguments they may have had that they had complied with" the local rules. 710 F.2d at 523 n.12. Here, by contrast, petitioners had adequate opportunity to convince the Federal Circuit that their appeal was not frivolous. See also *Malhiot* v. *Southern California Retail Clerks Union*, 735 F.2d 1133 (9th Cir. 1984), cert. denied, No. 84-595 (Jan. 21, 1985); *Nevijel* v. *North Coast Life Ins. Co.*, 651 F.2d 671 (9th Cir. 1981).

hesitated to assess damages and costs against counsel.[11]

c. It is unclear whether petitioners challenge the amount of the award as unjust, or the fact that the court did not explain how the sum was calculated. Regarding the former, it would be absurd to suggest that an award of $500 was excessive. Counsel for the government was required to prepare and file an appellate brief and present oral argument in a case involving five petitioners, and a United States Court of Appeals was required to review the briefs, hear oral argument, and write an opinion.[12] Nor do petitioners give any reason why the court of appeals had to explain how it arrived at the sum; given the modest and clearly reasonable amount, even if there were such a requirement it would be harmless error not to have satisfied it in this case. We note that this Court has not always explained its calculations when making similar awards. See *Hatch* v. *Reliance Ins. Co.*, No. 85-641 (Jan. 13, 1986); *Hyde* v. *Van Wormer*, No. 84-1993 (Nov. 18, 1985).

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[11] See, *e.g.*, *American Security Vanlines, Inc.* v. *Gallagher*, No. 85-5344 (D.C. Cir. Jan. 31, 1986), slip op. 3; *Browning Debenture Holders' Committee* v. *DASA Corp.*, 605 F.2d 35, 40-41 (2d Cir. 1978); *Good Hope Refineries, Inc.* v. *Brashear*, 588 F.2d 846, 848 (1st Cir. 1978). See generally Annot., *What Circumstances Justify Award of Damages and/or Double Costs Against Appellant's Attorney Under 28 USCS § 1912, or Rule 38 of the Federal Rules of Appellate Procedure*, 50 A.L.R. Fed. 652 (1980 & Supp. 1985).

[12] The attorney fees alone in this case clearly exceeded $500. At the rate of $75 per hour, the amount routinely awarded under the Equal Access to Justice Act, the $500 award compensated government counsel for less than seven hours of work —time clearly insufficient to prepare an appellate brief and oral argument.

d. Finally, there is nothing in Rule 38 to suggest that awards are limited to appeals taken in bad faith. Rule 38 requires only that the appeal be "frivolous," and the court of appeals found that this appeal was "clearly frivolous." [13]

With literally thousands of cases before it regarding the air traffic controllers' strike, the Federal Circuit must be able to manage its docket by discouraging frivolous appeals like petitioners'. Its very modest award under Rule 38 was entirely justified.

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[13] In *Roadway Express*, this Court found a requirement that an award of attorney fees be preceded by a finding of "bad faith" or conduct tantamount to it—but, again (see pages 10-11 n.10, *supra*), only in the context of a court exercising its inherent powers. 447 U.S. at 766-767. The Court did not conclude that such a finding is necessary where, as here, a court acts pursuant to a published rule that does not incorporate a bad faith standard (see Pet. 10). This Court has recently imposed sanctions for frivolous petitions—without an explicit finding of bad faith—in *Hatch* v. *Reliance Ins. Co.*, *supra*, and *Hyde* v. *Van Wormer*, *supra*. Nor does the Seventh Circuit require a showing of bad faith in order for an appeal to be frivolous under Rule 38 (see Pet. 10, citing *Freeman* v. *Local Union No. 135*, 746 F.2d 1316 (7th Cir. 1984)). As the court explained in *In re TCI Ltd.*, 769 F.2d 441, 445 (7th Cir. 1985), "[s]ubjective bad faith or malice is important only when the suit is objectively colorable." While as a matter of discretion the Seventh Circuit has considered the presence or absence of bad faith in determining "whether the case is an appropriate one for the imposition of sanctions" under Rule 38—see *Reid* v. *United States*, 715 F.2d 1148, 1154-1155 (7th Cir. 1983)—it has never said that Rule 38 requires such a showing.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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